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ARTICLES

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the Second Restatement Approach to Cases in Contract *Harold P. Southerland*

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Conflict of Laws in Florida: The Desirability of Extending the Second Restatement Approach to Cases in Contract

Harold P. Southerland*

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I. INTRODUCTION

For roughly a century and a half in United States legal history, territorial theory supplied largely uncontroversial solutions to problems in choice-of-law. For torts, it was the law of the place of injury; for contracts, the law of the place where a contract was made or was to be performed. Disputes involving real property were uniformly referred to the law of the state in which the property was situated, and those involving personalty to the law of the state where the owner was domiciled.

So sovereign-seeming were the states of the United States during this period that these handful of simple rules had about them the aura of ineluctability. Each state had its own distinct legal system, absolute within its territorial boundaries. These systems had much in common, but there were differences, often significant ones, and when these differences came to focus in the occasional conflict-of-laws case, it seemed natural to resolve them by reference to the law of the state where legally significant events occurred.¹

* Associate Professor of Law, Florida State University; J.D., University of Wisconsin 1966; B.S., United States Military Academy, 1956.

1. See, e.g., Harold P. Southerland & Jerry J. Waxman, *Florida's Approach to Choice-of-Law Problems in Tort*, 12 FLA. ST. U. L. REV. 447, 453-55 (1984).

The only debatable question—usually more of theoretical than practical importance—was why, exactly, a court with complete power to decide a case would use another state's law rather than its own. To Joseph Story, who spoke for the nineteenth century, the answer lay in comity—the deference and respect that one sovereign state owed to the law making power of another.² To Joseph Beale, who tried to cement territorial theory for all time in the 1934 Restatement of Conflict of Laws, the answer was one of obligation. One state applied the laws of another because it had to. Legal rights and liabilities came into existence in the first instance only by virtue of the law of some place; once created under that law, they were fixed and could thereafter be enforced in some other place only in the form of their creation.³

Real dissatisfaction with territorial principles began to manifest itself in the first third of this century.⁴ Against a backdrop of monumental change in the larger society, territoriality and the results it dictated grew increasingly unpalatable to judges striving to do justice in individual cases and no longer overawed by notions of sovereignty.⁵ The result was the well known and still on-going choice-of-law revolution—a pattern of decision making in which territorial rules were first avoided and then gradually, starting in the 1960s, rejected outright in a growing number of states for one or another of

2. See J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 23–25, 32–38 (photo. reprint 1972) (1st ed. 1834).

3. See 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 71, app. at 1964–65 (1935); see also ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 8 (3d ed. 1981):

Mr. Justice Story's "comity" theory held that the forum was free to do as it wished; the forum, for reasons of practical convenience or moral obligation, might often permit foreign law to operate. . . . To Professor Beale and other vested-rights theorists, "comity" was a fighting word. The term itself implied that the court possessed an undesirable degree of discretion concerning the applicable law, and the principle violated their view of the territorial premise. Thus the vested-rights approach stressed a legal obligation to recognize rights based on foreign law: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere."

Id. (quoting BEALE, *supra* at 1969).

4. See, e.g., Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 Yale L.J. 457 (1924); Ernest G. Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 43 Yale L.J. 736 (1924); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 Yale L.J. 468 (1928).

5. See, e.g., Harold P. Southerland, *A Screaming Comes Across the Sky—Tort Choice-of-Law Doctrine in Florida Under the Second Restatement of Conflicts*, 40 MERCER L. REV. 781, 787–90 (1989).

the so-called modern approaches.⁶ So much has been made of this revolution and the new learning it embodies that it is possible to lose sight of an important point. Most of the pressure for change was felt in just two areas—in torts primarily and, to a somewhat lesser extent, in contracts.⁷

In all this, the Florida experience has been typical. Territorial theory fell as naturally to hand here as elsewhere, rationalized repeatedly in over a century's worth of opinions in the language of comity—a beneficial exercise in that deference and respect that one sovereign state owes the law-making power of another.⁸ In 1967, in a wrongful death case arising out of the crash of a commercial airliner,⁹ the Supreme Court of Florida moved to align itself with the modern approach for tort cases then being pioneered by the New York Court of Appeals,¹⁰ but on rehearing, it reconsidered and reversed itself.¹¹ Thirteen years later, in *Bishop v. Florida Specialty Paint Co.*,¹² the court took this step. It discarded *lex loci delicti*, the inflexible place-of-injury rule, and replaced it with the most significant relationship approach of the Second Restatement of Conflict of Laws. After *Bishop*, it seemed probable that the venerable *lex loci contractus* doctrine for contracts cases would be the next to go, discarded and replaced with a modern approach, the obvious candidate being the Second Restatement. But when the opportunity squarely presented itself in 1988 in *Sturiano v. Brooks*,¹³ the court declined to make the change.

Sturiano involved an automobile insurance contract. The Sturianos, husband and wife, were lifelong residents of New York and had insured their

6. See, e.g., Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 802–20 (1983).

7. See, e.g., *id.* at 775–76.

8. See, e.g., *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 16 (Fla. 1984) (Shaw, J., dissenting); *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375 (Fla. 1977); *Gillen v. United Serv. Auto. Ass'n*, 300 So. 2d 3, 6 (Fla. 1974); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743, 746 (Fla. 1967); *Beverly Beach Properties, Inc. v. Nelson*, 68 So. 2d 604, 609 (Fla. 1953); *Markham v. Nisbet*, 60 So. 2d 393, 394 (Fla. 1952); *Kellogg-Citizens Nat'l Bank v. Felton*, 199 So. 50, 54 (Fla. 1940); *Beckwith v. Bailey*, 161 So. 576, 581 (Fla. 1935); *Hartford Accident & Indemnity Co. v. City of Thomasville*, 130 So. 7, 8 (Fla. 1930); *Mott v. First Nat'l Bank*, 124 So. 36, 37 (Fla. 1929); *Herron v. Passailaigue*, 110 So. 539, 542 (Fla. 1926); *Warren v. Warren*, 75 So. 35, 44–45 (Fla. 1917); *Walters & Walker v. Whitlock*, 9 Fla. 86, 96 (1860); *Perry v. Lewis*, 6 Fla. 555, 559 (Fla. 1856).

9. *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967).

10. See *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963); see also Southerland & Waxman, *supra* note 1, at 536–42.

11. *Hopkins*, 201 So. 2d at 749.

12. 389 So. 2d 999 (Fla. 1980).

13. 523 So. 2d 1126 (Fla. 1988).

car there. At some point after the policy was issued and without notice to their insurer, they began to spend the winter months each year in Florida. While in Florida Mr. Sturiano negligently caused an automobile accident in which he was killed and his wife injured. She brought suit in Florida against her husband's estate to recover under the policy. Under New York law, her claim was barred because the Sturianos had not elected coverage for claims between spouses as required by New York statute. Florida law had no corresponding provision.¹⁴ The Fourth District Court of Appeal reversed a jury verdict in Mrs. Sturiano's favor, holding that New York law controlled because the contract of insurance had been made there.¹⁵ The court then certified the question whether *lex loci contractus* should continue to be the conflicts rule in Florida, precluding consideration of "OTHER RELEVANT FACTORS, SUCH AS THE SIGNIFICANT RELATIONSHIP BETWEEN FLORIDA AND THE PARTIES AND/OR THE TRANSACTION?"¹⁶

In a majority opinion by Justice Kogan, the supreme court answered the certified question affirmatively, though expressly limiting itself to automobile insurance contracts.¹⁷ The court recognized that *lex loci contractus* was "inflexible" and that it had been replaced in other states by modern approaches.¹⁸ But it was just this inflexibility that ensured "stability in contract arrangements;"¹⁹

Although *lex loci contractus* is old, it is not yet outdated. . . . Parties have a right to know what the agreement they have executed provides. To allow one party to modify the contract simply by moving to another state would substantially restrict the power to enter into valid, binding, and stable contracts. There can be no doubt that the parties to insurance contracts bargained and paid for the provisions in the agreement, including those provisions that apply the statutory law of that state.

. . . In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction's laws are incorporated by implication into the agreement. The parties to this

14. *Id.* at 1127, 1129. See MCKINNEY, N.Y. INSURANCE LAW § 3420(g) (McKinney ed., 1985).

15. *Brooks v. Sturiano*, 497 So. 2d 976, 979 (Fla. 4th Dist. Ct. App. 1986), *aff'd*, 523 So. 2d 1126 (Fla. 1988).

16. *Id.* at 979.

17. *Sturiano v. Brooks*, 523 So. 2d 1126, 1129 (Fla. 1988).

18. *Id.*

19. *Id.*

contract did not bargain for Florida or any other state's laws to control. We must presume that the parties did bargain for, or at least expected, New York law to apply.²⁰

In the course of the opinion Justice Kogan quoted in its entirety section 188 of the Second Restatement, conceding that its view was "seemingly the trend of courts around the nation."²¹ But it failed, he said, "to adequately provide security to the parties to a contract."²²

Justice Grimes concurred in a separate opinion, joined by Justice Overton, in which he argued for adoption of the Second Restatement approach. "The emerging consensus, [he said], even in cases involving questions of contract validity, is to apply the most significant relationship test of section 188 of the Restatement (Second) of Conflict of Laws (1971)."²³ He continued:

Because contractual disputes arise in such a great variety of settings, rules of broad application cannot do justice to the various interests and expectations involved. While the application of the significant relationship test may be less certain, it reflects a more realistic standard by which a choice of laws may be made. Furthermore, I believe the majority's concern for predictability and the parties' right to know what the agreement provides is adequately taken into account by factors (d) (the protection of justified expectations) and (f) (certainty, predictability and uniformity of result) of section 6 of the Second Restatement which is made applicable to section 188.²⁴

Notwithstanding his preference for the Second Restatement, he concurred in the majority's opinion because he believed that the result would be the same under either approach.²⁵

The question certified in *Sturiano* is unlikely to go away. It has in fact arisen since—though not pressed by the parties to the supreme court level—and almost surely will arise again.²⁶ Given the division within the court reflected in the *Sturiano* opinions, it seems appropriate to consider what the

20. *Id.* at 1129–30. (emphasis added).

21. *Id.* at 1129.

22. *Sturiano*, 523 So. 2d at 1129.

23. *Id.* at 1130 (Grimes, J., concurring).

24. *Id.* at 1130–31.

25. *Id.* at 1131.

26. *See In re Santos*, 648 So. 2d 277 (Fla. 4th Dist. Ct. App. 1995).

court should do when it again confronts the issue. Should it take the same approach for contracts as it did for torts and abandon *lex loci contractus* for the approach of the Second Restatement? Certainly a good case can be made for the change. Writing in 1987 on the eve of *Sturiano*, Professor Michael Finch and his co-author, Lora Smeltzly, exhaustively surveyed the Florida cases and concluded that the Second Restatement would bring “to Florida conflicts law a structure and approach that impose some order on a seemingly disparate body of precedent and that can guide the courts as conflicts practice continues to evolve.”²⁷ This is a defensible point of view, and in the end I think the court will make the change—in part because change is in the nature of things, in part because it will be difficult to resist the blandishments of the district courts of appeal, who I suspect would prefer what they perceive to be the greater freedom and flexibility offered by the Restatement approach.

Yet the prospect leaves me with distinctly uneasy feelings. For one thing, the doctrine of *lex loci contractus*, properly understood, has always been a far more malleable one than its torts counterpart, *lex loci delicti*. Despite the disparate contexts in which contracts cases can arise, I have no sense from the decisions that Florida’s courts have been unduly hampered in arriving at sensible and just results with a fair degree of simplicity and efficiency; nor am I persuaded that the actual results in cases would be that much different or necessarily more defensible under the Second Restatement approach than under the present one. For another, the Second Restatement approach is complex and alive with protean possibilities, combining as it does invitations to open-ended policy analysis with attempts to state specific rules for a variety of commonly occurring kinds of cases. It has found favor as a replacement for territorial methods with a number of courts around the country,²⁸ but in actual use it has been much criticized.²⁹ In its complexity, it has the potential to confuse and complicate decision making rather than

27. See Michael S. Finch & Lora Smeltzly, *The Restatement Second and Conflict of Laws: Extending the Bishop Approach to Problems in Contract*, 16 STETSON L. REV. 261, 292 (1987).

28. See, e.g., ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 132 (5th ed. 1993); Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 362–64 (1992).

29. See, e.g., Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466, 486–89 (1991); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992); Joseph W. Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 77 (1989).

simplifying it. This observation is borne out by the uneven and disappointing experience in Florida thus far with the torts provisions of the Second Restatement, particularly at the supreme court level.³⁰

In short, I am not convinced that it would be productive for the court to adopt the Second Restatement approach for cases in contract. I see little advantage and potentially much grief flowing from it. There is not much doubt that Florida can continue to survive with its traditional territorial approach. Whether that would be a good thing or not is more debatable; like almost any other method, *lex loci contractus* has shortcomings, but at least in Florida these problems would not be eliminated by substituting the approach of the Second Restatement. That is the thesis I shall try to develop in what follows. The time is ripe, for there is no more pressing issue on the court's rather meager conflict-of-laws agenda than this one.

II. FROM TERRITORIAL TO POLICY ANALYSIS: THE ROAD TO THE SECOND RESTATEMENT OF CONFLICT OF LAWS

A range of considerations bear on the question of whether *lex loci contractus* should be replaced in Florida with the approach of the Second Restatement. To raise these considerations and put some perspective on them, I want to discuss two cases, both staples in the literature of conflict-of-laws. They are *Milliken v. Pratt*,³¹ decided by the Massachusetts Supreme Judicial Court in 1878, and *Lilienthal v. Kaufman*,³² a 1964 decision of the Oregon Supreme Court. These cases stand at opposite ends of the spectrum of developments that have occurred in choice-of-law in the United States from the nineteenth century to the present. Either directly or by implication they have much to say about the traditional territorial approach and why it has lost favor in many quarters. In this way, it will be possible to convey a sense of what brought the Second Restatement into being so quickly on the heels of the First Restatement and thus provide a framework for evaluating its approach and how well or ill it deals with issues of contract and choice-of-law.

30. See generally Southerland, *supra* note 5. For a somewhat more temperate appraisal, see Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653 (1995). For an account of the Florida courts' traditional approach to conflicts cases involving property, see Michael S. Finch, *Choice-of-law and Property*, 26 STETSON L. REV. 257 (1996).

31. 125 Mass. 374 (1878).

32. 395 P.2d 543 (Or. 1964).

A. Milliken v. Pratt

Daniel Pratt and his wife Sarah were life-long residents of Massachusetts. In 1870, Daniel, a businessman, applied to the Portland, Maine, firm of Deering, Milliken & Co. for a line of credit. The firm agreed on the condition that Sarah guarantee payment of the account up to the amount of five hundred dollars. She executed a separate agreement to this effect at her home and gave it to her husband, who mailed it to the firm in Portland. During the following year, Daniel bought goods on credit from time to time and paid for them promptly. Then in October 1871 he defaulted, leaving an unpaid balance of \$560.12. In January 1872, Deering-Milliken demanded payment from Sarah under the guaranty. She refused. In 1875, the firm brought suit against her in Massachusetts to recover \$500 of the unpaid balance.³³

Sarah Pratt's refusal to honor her agreement, as well as her defense to the lawsuit, was grounded in the male-dominated society of nineteenth-century America and its attitude towards women. At the time she executed the agreement in 1870, portions of the common law rule that disabled married women from entering into contracts in their own name were still in force in Massachusetts.³⁴ At common law, marriage was considered a true merger of two souls—one which only the husband survived as a legal entity.³⁵ This fiction no doubt made a great deal of sense to the men whose business it was to lay down legal rules: wives, being women, were known to be inexperienced in the ways of the world and thus in need of protection. What better way to protect them than to insure that in any matter of importance—that is, one involving money or property—they could act only through and in the name of their husbands?

It seems patent that it was husbands whom this convenient fiction protected, but nevertheless that was the law in Massachusetts in 1870 when Sarah executed the guaranty. As far as Massachusetts was concerned, she had no capacity to enter into this kind of a contract in her own name, and her guaranty was unenforceable. In Maine, on the other hand, it was perfectly

33. *Milliken*, 125 Mass. at 374–75.

34. *Id.* at 376–77.

35. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 184–85 (1973). See generally MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

enforceable; Maine had emancipated married women by statute in 1866, giving them the same power to contract that men and single women enjoyed.³⁶ Massachusetts would likewise change its rule, but not until 1874, well after the execution of the guaranty and the subsequent events that gave rise to the lawsuit.³⁷ The trial court held for Sarah, and Deering-Milliken appealed.

The opinion of the Supreme Judicial Court, written by Chief Justice Gray, began with a statement of the general rule:

[T]he validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract.³⁸

The agreement executed by Sarah at her home in Massachusetts, the court said, was an offer which ripened into a contract only when Deering-Milliken received the guaranty in Portland and acted on it there by selling goods on credit to Daniel. The contract therefore had to be treated as one made and to be performed in Maine.³⁹ The case fell within the general rule, and the only question was whether Sarah's incapacity under Massachusetts law made a difference.

On this point, the authorities were divided. On the continent, where the civil law largely prevailed, the view was that the capacity to enter into a contract was at all times governed by the law of a person's domicile, regardless of where the contract was made.⁴⁰ The weight of authority in England and the United States went the other way, holding that capacity was a function of the law of the place of contracting.⁴¹ Was it possible that Sarah's contractual incapacity had traveled with her, so to speak, when she went to Maine and made the contract? Such a rule, the court said, would hardly be suitable for a nation like the United States:

[I]t is only by the comity of other states that laws can operate beyond the limit of the state that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or

36. *Milliken*, 125 Mass. at 376.

37. *Id.* at 377.

38. *Id.* at 375 (citation omitted).

39. *Id.* at 376.

40. *Id.* at 381, 382.

41. *Milliken*, 125 Mass. at 378-81.

to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.⁴²

The place-of-making rule was clearly the preferable one. The court took note of the possibility that Sarah's incapacity might be considered "so fixed by the settled policy of . . . [this] state, for the protection of its own citizens, . . ."⁴³ as to justify a refusal to give effect to the otherwise applicable law of Maine. That condition plainly did not obtain in Massachusetts

even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings, and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.⁴⁴

The court accordingly applied the law of Maine, upheld the validity of the contract, and enforced it against Sarah.

The most striking thing about the case is the result: the contract was enforced, notwithstanding that under Massachusetts law Sarah Pratt's pen was bereft of ink when she signed the agreement. The reasoning of the opinion was beguilingly syllogistic. The question was whether the contract was valid. The court's choice-of-law rule told it to make this determination by applying the law of the state where the contract was made. That state was Maine, and the contract was valid there. The outcome seems so unexceptional that it is easy to miss its implications.

42. *Id.* at 382–83.

43. *Id.* at 383.

44. *Id.*

There was a problem in the first place because the laws of Maine and Massachusetts differed as to matters of contractual capacity. The Massachusetts Legislature was in the process of changing the law to emancipate married women as Maine had done, but at the time this case arose it still retained so much of the older doctrine as disabled a married woman from agreeing to guarantee her husband's debts. What was it about this situation that warranted such focused attention? The prevailing climate of opinion held that married women were subservient to their husbands and were supposed to obey them in all things. It was therefore believed that they could easily be influenced, even coerced, and hence were unlikely to act in such a matter of their own free will or with full awareness of the consequences. The relationship of marriage created a potential for abuse—of wives most obviously, but also of creditors, who might otherwise rely on a signature that was really no better than the debtor's own. There was a need for special protection, or so the Massachusetts Legislature might reasonably have believed.

Sarah Pratt was a Massachusetts married woman. No matter what the court thought of the law and the wisdom of its underlying policy, it would have had no choice but to invalidate the agreement if the case had arisen entirely within Massachusetts—that is, if it had involved no out-of-state elements. But here there was a choice, and it was one that the court exercised with a will. Obviously it thought it was better to subordinate Sarah's claim to the protection of Massachusetts law in order to uphold the contract and enforce it in favor of a Maine creditor. The interesting question is why.

Much of the answer lies in the idea of contract and its importance to a society constituted not along lines of status—caste, class, accidents of birth—but on the radical proposition that “[t]he ideal way to organize social relations was through free voluntary agreement, by persons pursuing their own ends.”⁴⁵ The movement from status to contract had its origins in England, but nowhere did it reach fuller fruition than in the United States, which almost from the beginning was a business and market-oriented, profit-motivated society of individuals free to exercise their will and ambition in order to prosper and improve their condition in life. A society like this *required* the idea of contract, and the texture of this nation as it has evolved and exists today—the myriad of commercial, economic, and social interrela-

45. FRIEDMAN, *supra* note 35, at 464.

tionships that undergird and define the United States can hardly be imagined without it.⁴⁶

Because it lay ready to hand, the legal system was given the important role of maintaining an environment in which this kind of structured activity could go on—an environment which not only encouraged the making of agreements but also gave assurance that where necessary they would be enforced. It was a role that courts took seriously, all the more so because the law of contract itself did not shape the contours of social and economic relationships so much as give tangible expression to deeply held beliefs about what society valued in life and what the ground rules ought to be in getting it.⁴⁷ At the turn of the century, freedom of contract was considered an essential part of the concept of ordered liberty enshrined in the due process clause of the fourteenth amendment.⁴⁸ If less than that today, it has nevertheless numbered among this nation's articles of faith. The quasi-religious overtones in that phrase are hardly misplaced.

It is easy to see the court's opinion as a reflection and affirmation of these values. The justices of the Supreme Judicial Court of Massachusetts were a group of men stamped in the mold of a state that was among the original centers of shipping, trade, commerce, business, and manufacturing in the United States—a state built, almost literally, on the ability of men to deal with one another at arm's length with the assurance that their bargains would be kept. To these men, the importance of business and commercial transactions was obvious; equally obvious was the need to encourage and facilitate these transactions when they crossed state lines. The states were sovereign, but not in the same way as the nation-states of Europe. Free and unfettered commercial intercourse was the norm. "Especially in this country," the court said, it would be unjust as well as inconvenient to allow quirks of local law to interfere with the security of transactions.⁴⁹ It would

46. See FRIEDRICH KESSLER & MALCOLM P. SHARP, *CONTRACTS* 2–9 (1st ed. 1953); JAMES W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 5–29 (1956) [hereinafter *CONDITIONS OF FREEDOM*]; JAMES W. HURST, *LAW AND MARKETS IN UNITED STATES HISTORY* 10–50 (1982); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 936–52 (1974).

47. See FRIEDMAN, *supra* note 35, at 244–47, 464–68; *CONDITIONS OF FREEDOM*, *supra* note 46, at 11–12; see generally LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965).

48. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

49. *Milliken*, 125 Mass. at 382.

“greatly cripple the power of contracting abroad at all.”⁵⁰ Far better to refer these cases uniformly to the law of the place of contracting, which was the law that parties presumably had in mind when they made agreements.⁵¹

This typically hard-headed and practical assessment was leavened with an element of cold-blooded calculation. It was not lost on the court that its preferred set of values could be implemented only at the sacrifice of local policy and the fortunes of a local resident. Massachusetts law presumed that a married woman signed an agreement of this sort not of her own free will and with full awareness of the consequences, but only in obedience to her husband. It had to be presumed, therefore, that Sarah had not signed in the belief that she could never be held to her agreement: there was no bad faith or intention to deceive. She had never left her home in Massachusetts, much less the shelter of its protective laws. She was the quintessential innocent victim contemplated by the law. As to this aspect of the case, the opinion was silent, the court’s views appearing only by necessary implication in the result. The fair inference is that a little injustice at the local level was a small price to pay for furthering the orderly transaction of business.

This result was by no means inevitable. With a different order of values the court might have put another interpretation on the course of the parties’ dealings with one another. It might, for example, have construed the writing in question as a counteroffer by Deering-Milliken to sell goods to Daniel on credit in exchange for Sarah’s promise to guarantee payment.⁵² This offer would have ripened into a contract when Sarah signed the agreement at her home in Massachusetts and caused it to be placed in the mail there. The instrument in fact recited the payment of one dollar as consideration (although this sum was never paid).⁵³ The result would then have been a separate contract between Deering-Milliken and Sarah, bilateral and executory in nature, but made in Massachusetts.

Another possibility for avoiding the application of Maine law lay in the aspect of public policy touched upon briefly at the end of the opinion. Territorial theory, in the version expounded by Joseph Story in his highly influential nineteenth-century treatise, recognized the right of a state to refuse to give effect to a law that would violate its own public policy. In Story’s view the territorial rules had their theoretical basis in the principle of

50. *Id.* at 382–83.

51. *Id.* at 382.

52. See RUSSEL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 364–65 (3d ed. 1986).

53. *Milliken*, 125 Mass. at 376.

comity. Enforcing another state's laws was therefore always a voluntary act, and no state could be required "to yield up its own fundamental policy" to that of another.⁵⁴ This was the root of the so-called public policy exception, perhaps the most important of the judicially developed techniques for avoiding the operation of territorial rules without rejecting them outright.⁵⁵

The court was heavily influenced by Story's views and was therefore well aware that it had the power to deny enforcement to the law of Maine.⁵⁶ It had only to characterize Massachusetts' policy of protecting married women as "fundamental," or, in its own words, as sufficiently "fixed by the settled policy of the state . . ."⁵⁷ Rationalizing this conclusion might have been tricky in light of the demise of the policy in 1874; but as we shall see, the contours of the public policy exception and the conditions necessary to its invocation have never been precise.⁵⁸ It could have been done if the court

54. STORY, *supra* note 2, § 25. "Much less," he continued, "can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty." *Id.*

55. See, e.g., CRAMTON ET AL., *supra* note 3, at 141–45; Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

56. Justice Story's treatise is approvingly cited at several points in the opinion, *Milliken*, 125 Mass. at 377, 378, 381, and the court plainly subscribed to the theory of comity as the basis for the enforcement of extraterritorial rights:

As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its operation and enforcement here may be restricted by positive prohibition of statute. A state may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens, which are not authorized by its own laws. . . .

It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract.

Id. at 383.

57. *Id.*

58. See, e.g., HERBERT F. GOODRICH & EUGENE F. SCOLES, *CONFLICT OF LAWS* § 11, at 14 (4th ed. 1964):

Proponents of [the public policy] exception hold that the ordinarily applicable conflict of laws doctrine will not be followed when to do so would violate the strong public policy of the forum. As so used the term "public policy" is so vague and general as to defy definition. The strength of the policy necessary to call the exception into operation is unclear and varies with the facts.

had wanted to protect Sarah Pratt, and it would have been neither the first nor the last time that the name “fundamental” was put to a policy reflected in some minor wrinkle of a state’s law.⁵⁹ In the end, protecting the bargain was simply more important.

Milliken appears in many conflict-of-laws casebooks as a classic illustration of the *lex loci contractus* rule, but its deeper significance lies in the fact that it is utterly typical of the way in which American courts have tended to deal with matters of contract and choice-of-law. They take as a given that the institution of contract itself represents a value of fundamental importance to society. Those who enter into agreements do so with goals and purposes in mind; provided that an agreement is neither illegal nor contrary to public policy, the intentions of the parties and the expectations arising therefrom assume paramount importance. Courts perceive their function to be the essentially legitimating one of effectuating the intentions of the parties and thereby protecting their expectations.⁶⁰

With traditional methods, this disposition shows up in the decisions in two primary ways. The first is in the willingness of courts to give effect to the concept of party autonomy. Party autonomy has nothing to do with territoriality as such, but refers to the ability of the parties to contract with reference to the law of a particular jurisdiction. Sometimes their intent is implicit in their agreement,⁶¹ sometimes explicit in the form of a choice-of-law clause.⁶² The idea originated in the eighteenth century in England in an opinion by Lord Mansfield and quickly took hold in the United States.⁶³ Its popularity here is an obvious reflection of the importance attached to party intentions, at least as long as the law chosen bears some sort of reasonable relation to the parties or their transaction.⁶⁴

The second has to do with the territorial doctrine of *lex loci contractus* and the way in which courts have used it in actual practice. The court’s

Id.; see also CRAMTON ET AL., *supra* note 3, at 141–45; Paulsen & Sovern, *supra* note 55; Southerland & Waxman, *supra* note 1, at 463–69.

59. See, e.g., *Gillen v. United Services Auto. Ass’n*, 300 So. 2d 3 (Fla. 1974) (refusing to give effect on public policy grounds to an “other insurance” clause contained in an insurance policy issued in New Hampshire).

60. See, e.g., ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 420–23 (4th ed. 1986); EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 657 (2d ed. 1992).

61. See, e.g., LEFLAR ET AL., *supra* note 60, at 413–14.

62. See, e.g., *id.* at 413–19.

63. See 2 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICTS OF LAWS* § 332.5, at 1092–1100. The case was *Robinson v. Bland*, 2 Burr. 1077, 1 W. Bl. 234 (1760). See generally ALBERT A. EHRENZWEIG, *CONFLICT OF LAWS* §§ 173–175 (1962).

64. See, e.g., SCOLES & HAY, *supra* note 60, at 669–673.

statement of the rule in *Milliken* is accurate as far as it goes, but misleading to the extent that it suggests that the law of the place of contracting governs in every case. The Latinism "*lex loci contractus*" literally means the law of the place of contracting, but the term is also loosely used to refer to the territorial approach in contracts cases generally, and in this sense means something more. In *Scudder v. Union National Bank*,⁶⁵ for example, the case relied upon by Chief Justice Gray, the Supreme Court set out the rule in these terms:

Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.⁶⁶

It is apparent from this statement that *lex loci contractus* is not one rule, but three. It therefore comes with a built-in flexibility that courts have not hesitated to exploit in order to effectuate party intentions. Since this can rarely be done by choosing a law that invalidates a contract, the overwhelming observable tendency has been one of selective use of the three rules to produce a choice of validating law.⁶⁷ The opinions frequently fail to make the distinction between issues of validity and issues of performance. Validity may be determined in one case by the law of the place of contracting and in another by the law of the place of performance; in like fashion, performance-related questions may, on one occasion, be determined by the law of the place of performance and, on another, by the law of the place of contracting.⁶⁸ And there are cases in which courts characterize the course of

65. 91 U.S. 406 (1875).

66. *Id.* at 412–13. In *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 49 (Fla. 1899), the Supreme Court of Florida adopted the rule in the form adopted by the *Scudder* Court, and it has been the law in Florida ever since. See, e.g., *Jemco, Inc. v. United Parcel Serv., Inc.*, 400 So. 2d 499, 501 n.4 (Fla. 3d Dist. Ct. App. 1981).

67. See, e.g., *LEFLAR ET AL.*, *supra* note 60, at 407 n.6, 420–23; *EHRENZWEIG*, *supra* note 63, at §§ 175–182.

68. See, e.g., *BEALE*, *supra* note 3, at 1105–09; *LEFLAR ET AL.*, *supra* note 60, at 405–413. In surveying cases in the United States Supreme Court from 1825 to 1928, Professor Beale states:

It will thus be seen that almost every rule ever suggested for determining the law applicable to the validity of a contract which has ever been seriously urged in

the parties' dealings with one another in such a way as to locate the place of making in a state whose law upholds the agreement.⁶⁹

Traditional practice might seem a doctrinal mess were it not for the striking fact that the law chosen is usually one under which the contract in question can be upheld. The wealth of judicial practice brings to mind one of the more profound observations about the choice-of-law process, which was made by Professor Robert Lefflar. He said that choice-of-law has never been a purely

jurisdiction-selecting process, with courts first deciding which state's law should govern and checking afterward to see what that state's law [is] Everyone knows that this is not what courts do, nor what they should do. Judges know from the beginning between which rules of law, and not just which states, they are choosing. . . .

. . . The inclination of any reasonable court will be to prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules.⁷⁰

The fair inference from the cases is that courts think that enforcing agreements makes good socio-economic sense and are not above using the choice-of-law decision itself as a way of furthering this value judgment.

The fact that courts engage in a certain amount of result-oriented decision making is not the shocking proposition it once was. Whether this is what they *ought* to do, as Lefflar also asserts, is a different question and a much more difficult one. Every conflict-of-laws case involves two decisions. A court must first decide whose law governs, and then, under that law, what the outcome is. The catch, of course, is that the choice-of-law decision itself is often outcome-determinative. Hence the recurrent bedeviling question in choice-of-law centers on what "justice" means, or ought to

a common-law court has at one time or another been adopted by the Supreme Court of the United States as the basis of its decision; that each decision has been made apparently without realizing its inconsistency with former decisions; and that many of the decisions are self-contradictory.

BEALE, *supra* note 3, at 1108–09.

69. See, e.g., *Mutual Life Ins. Co. v. Liebing*, 259 U.S. 209 (1922); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Ray-Hof Agencies, Inc. v. Petersen*, 123 So. 2d 251 (Fla. 1960); *Confederation Life Ass'n v. Vega Y Arminan*, 207 So. 2d 33 (Fla. 3d Dist. Ct. App. 1968); 2 ERNST RABEL, *CONFLICT OF LAWS: A COMPARATIVE STUDY* 461–62 (2d ed. 1958).

70. Robert A. Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587–88 (1966).

mean, in such a case. Does it mean making the choice-of-law decision in a fair and impartial way, without regard to what result one law or the other would produce when applied to the facts of a case? Or does it mean reaching an end result that itself seems just, the choice-of-law decision being just another means to that end? The question is hardly academic. It has far-reaching implications for the kinds of choice-of-law rules that any particular court will prefer, as well as for the use it will make of them.

No one labored longer or harder to isolate the process of choice from its effect than Joseph Beale, the distinguished Harvard law professor who served as the Reporter for the 1934 *Restatement of Conflict of Laws*. Beale took the existing hodge-podge of traditional territorial practice and sought to impose logic and order on it in order to create a perfectly fair and impartial way of choosing law. To him, the content of the competing laws was irrelevant as was the result that one law or the other might produce in a given case. He was concerned only with how the choice-of-law decision was made. He predicated his system on the concept of "vested rights." If acts had legal significance, it could only be by virtue of the law of the place where those acts occurred. Legal rights or liabilities created under that law were said to vest at the moment of their creation and could thereafter be enforced in some other place only in that form. It followed from this that acts valid where done ought to be valid everywhere. Beale found the idea of comity offensive; it implied discretion where in his view none existed. One state applied the law of another, not out of deference and respect, but because it was obligated to.⁷¹

For contracts, Beale dispensed summarily with the concept of party autonomy. He argued that it was objectionable in theory because it conferred upon the parties permission "to do a legislative act,"⁷² and in practice because it was too uncertain and unpredictable: no one could say what effect a court might give to the expressed intent of the parties.⁷³ He attempted to transform the *lex loci contractus* doctrine into an instrument of precision, drawing the sharpest possible line between issues of contract validity and issues of performance.⁷⁴ All questions concerning validity,

71. See generally BEALE, *supra* note 3.

72. See *id.* at 1079, 1080-83.

73. See *id.* at 1083-86.

74. In the comments, Professor Beale conceded that the process of separating the two could be problematical:

[T]he nature of the obligation and the duty to render the performance for which a party becomes bound is governed by the law of the place of contracting. . . . [While] matters concerning performance of a contract are determined by

including the nature of the obligation and the extent of the duty to perform it, he decisively referred to the law of the place of contracting⁷⁵—the place where “the principal event necessary to make a contract” occurred.⁷⁶ This was sound in theory, he said, because the question whether or not there was a contract could “on general principles be determined by no other law

the law of the place of performance A difficult problem is presented in deciding whether a question in a dispute concerning a contract is one involving the creation of an obligation or performance thereof. There is no distinction based on logic alone between determining the creation of the contract and the rights and duties thereunder on the one hand, and its performance on the other. . . . Regardless of the lack of logic, however, problems arising out of disputes upon contracts are settled as if certain acts pertained to the making of the contract and other acts to its performance. The applicability of the rule that the complete control of all questions is determined by the law of the place of contracting is therefore modified upon practical considerations. One law is applied to what is regarded as the initiation of a contract and another to what is regarded as its final performance. The point at which initiation ceases and performance begins is not a point which can be fixed by any rule of law of universal application to all cases. Like all questions of degree, the solution must depend upon the circumstances of each case and must be governed by the exercise of judgment.

RESTATEMENT OF CONFLICT OF LAWS § 332 cmt. c (1934) [hereinafter RESTATEMENT]. Professor Beale pursued the distinction in the comments to section 358, which states the general rule that issues of performance are governed by the law of the place of performance:

While the law of the place of performance is applicable to determine the manner and sufficiency and conditions under which performance is to be made, it is not applicable to the point where the substantial obligation of the parties is materially altered. As stated in § 332, Comment c, there is no logical line which separates questions of the obligation of the contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place of performance. There is, however, a practical line which is drawn in every case by the particular circumstances thereof. When the application of the law of the place of contracting would extend to the determination of the minute details of the manner, method, time and sufficiency of performance so that it would be an unreasonable regulation of acts in the place of performance, the law of the place of contracting will cease to control and the law of the place of performance will be applied. On the other hand, when the application of the law of the place of performance would extend to a regulation of the substance of the obligation to which the parties purported to bind themselves so that it would unreasonably determine the effect of an agreement made in the place of contracting, the law of the place of performance will give way to the law of the place of contracting.

Id. § 358 cmt. b. It is worth noting that the comments in the First Restatement are unofficial; that is, unlike the black-letter rules, they did not receive the endorsement of the American Law Institute and therefore rest on the authority of the reporter alone.

75. *See id.* § 332.

76. *Id.* § 311 cmt. d.

than . . . the law of the place of contracting.”⁷⁷ It was practically the best rule because there was usually no doubt where a contract was made, and it was also the easiest for the parties to follow.⁷⁸ Details relating to the performance of a contract, such as the manner, time, place, and sufficiency thereof, he referred to the law of the place of performance.⁷⁹

These rules were simple, logical, and ordinarily easy to apply. If widely adopted and faithfully followed, they offered a number of advantages. They would produce fair, impartial, and uniform results because courts everywhere would tend to make the choice-of-law decision in the same way. For this reason, it would make no difference where a particular suit was brought. The unseemly possibility of forum shopping would be eliminated altogether. Just as important, the rules would make the choice-of-law process easy, simple, certain, and predictable—qualities that the mass of conflicting decisions from the nineteenth and early twentieth centuries seemed to suggest were sorely needed.

Despite these virtues, the First Restatement has to be accounted a failure. Though intended as a definitive statement of territorial theory, its influence was never that great. Territoriality would remain the predominant approach until the 1950s, but not necessarily in the “vested rights” version prescribed in the Restatement; courts for the most part simply continued doing what they had always done.⁸⁰ The clearest evidence of its rejection is the fact that in 1953 the American Law Institute found it advisable to commence work on a replacement. In essence the First Restatement failed because it tried to reduce choice-of-law to a purely mechanical process. Its rigidity left no room for maneuver; in taking the element of judgment out of judging, it became a victim of its own drive for perfection. No one can deny that fairness and impartiality, ease of application, simplicity, certainty, predictability, and uniformity of result are important values in choice-of-law, or indeed, in any area of law. What the fate of the First Restatement suggests is that these values count for less in the minds of courts than the freedom to decide cases in ways that are perceived to make good socio-economic sense.

77. BEALE, *supra* note 3, at 1091.

78. *Id.* at 1091–92.

79. See RESTATEMENT, *supra* note 74, § 358.

80. For example, the vast majority of conflicts cases in Florida have been decided with territorial rules, but the underlying theory has always been one of comity rather than vested rights. See cases cited, *supra* note 8. It is rare to find a Florida appellate opinion in which the First Restatement is even cited, much less relied upon.

If nothing else, the First Restatement's existence is a persistent reminder that choice-of-law itself involves a choice—one that pits the need for rules and the impulse to follow them against intuitions of justice in some larger sense. If a court's choice-of-law rule calls for Georgia law, but its sense of justice cries out for Florida law, then it has a choice—the more agonizing one of values rather than laws. The dilemma is apt to seem most acute when the otherwise applicable law is one that strikes a court as silly or unwise. What “justice” is then may seem clear. At the same time, every court knows there is only so much tolerance for decisions that depart from an announced set of rules or that cannot easily be squared with them. There is “justice” there, too, in considerations of fairness, expectations and reliance, and certainty and predictability. If a court is simply going to “think deeply and decide justly,”⁸¹ it has no need for choice-of-law rules at all. The result of that can be chaos and confusion. What would happen as choice-of-law entered the modern era is ample proof of that.

B. *Lilienthal v. Kaufman*

Given the importance of contract in the nation's history, the result in *Milliken* is not surprising. But it makes all the more interesting the decision in *Lilienthal v. Kaufman*⁸² in which, almost a hundred years later, a similar case presented itself to the Oregon Supreme Court and was decided the other way.

Like *Milliken*, *Lilienthal* involved a question of contractual disability and its effect in a multi-state transaction.⁸³ Leonard Kaufman had been declared a spendthrift by the courts in the State of Oregon and he had a guardian appointed for him. The pertinent Oregon statute provided that all contracts he might enter into thereafter, except for necessities, were voidable by the guardian. Kaufman was apparently obsessed with binoculars and the buying and selling of them. He started a joint venture for that purpose with one Olshen, an Oregon resident, who advanced funds to underwrite the venture. When Kaufman tried to repay the loan with a bad check, Olshen sued. In that case, *Olshen v. Kaufman*,⁸⁴ the Oregon Supreme Court held that the guardian had the right to void the contract and preclude recovery.

81. Maurice Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 644 (1968).

82. 395 P.2d 543 (Or. 1964).

83. Unless otherwise indicated, the facts are taken from the court's opinion.

84. 385 P.2d 161 (Or. 1963).

Kaufman then went further afield, to California, where he persuaded Philip Lilienthal, a California resident, to advance funds for a similar joint venture, giving two promissory notes in exchange. The notes were executed and delivered in California. Though Lilienthal made routine credit checks, these failed to disclose that Kaufman was a spendthrift.⁸⁵ When he presented the notes for payment, the guardian once again asserted Kaufman's incapacity as a spendthrift and refused to pay. Lilienthal brought suit in Oregon to collect on the notes. He argued that California was the place of making since the notes were executed and delivered there, and that Oregon was bound under its conflicts rule—*lex loci contractus*—to apply the law of California. California law did not recognize the disability of a spendthrift. The trial court held for Kaufman, and Lilienthal appealed.

The opinion of the Oregon Supreme Court was written by Justice Denecke and ended by applying Oregon law and sustaining the spendthrift defense.⁸⁶ Two justices dissented. The case has been the object of a considerable amount of criticism in the conflicts literature, and few agree with the result.⁸⁷ I find it hard to share this view. To my mind, the majority opinion is remarkable not only for its reasoning and result, but also for the picture it gives of a conscientious court wrestling in a thorough and forthright way with a particularly thorny problem.

The first half of the opinion consisted of a frank concession that almost all of the existing conflicts theories called for the application of California law. It is worth tracing the court's discussion in some detail because it gives a concise picture of how far choice-of-law thinking had come in the years since *Milliken v. Pratt* was decided.

85. See CRAMTON ET AL., CONFLICT OF LAWS 253 (4th ed. 1987); David P. Currie, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 595, 603–04 (1968).

86. *Lilienthal*, 395 P.2d at 549.

87. See, e.g., CAVERS, THE CHOICE-OF-LAW PROCESS 189–92 (1965); WEINTRAUB, *supra* note 52, at 384–85; SCOLES & HAY, *supra* note 60, at 688–90; Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1597 (1978); Arthur T. von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975). But see Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 323 (1990); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 602 n.50 (1983). And, as Professor Weintraub and others have noted, the Oregon Supreme Court itself appears to have drastically reconsidered the approach it took in the case. See WEINTRAUB, *supra* note 52, at 385–86 (discussing *Casey v. Manson Constr. and Eng'g Co.*, 428 P.2d 898 (Or. 1967)). He adds, however, that at least one Oregon appellate court thinks that the *Lilienthal* approach is the correct one. See *id.* at 386 n.78 (citing *Straight Grain Builders v. Track N' Trail*, 760 P.2d 1350 (Or. App.)).

Lex loci contractus of course pointed to the application of California law. But here the court qualified its traditional reliance on that approach, expressing doubt as to its correctness “if the *only* connection of the state whose law would govern is that it was the place of making.”⁸⁸ The qualification was a significant echo of the modern criticism of the jurisdiction-selecting rules⁸⁹ of the First Restatement. In the vastly different, highly mobile society that America had become in the twentieth century, contracts could be made anywhere. Businessmen from two different states might meet for the weekend in New York City because they could take in a show while they settled their deal; they might finalize contracts while traveling cross-country by train or in a plane. These realities meant that the place *where* people happened to be *when* a contract came into existence under the familiar rules of the law of contracts could be wholly fortuitous, without connection either to the parties or their transaction. The court called this the “strongest criticism”⁹⁰ of *lex loci contractus*, but the main thrust of the rebellion against territoriality ran deeper. The jurisdiction-selecting rules of the First Restatement took no account of the content of the competing laws or the policies that they reflected; nor did they, in theory at least, provide much latitude for courts in trying to achieve what they perceived to be just results in individual cases.⁹¹

But in this case, as the court readily conceded, the place of making was not California’s only connection. Kaufman had gone to California to persuade Lilienthal to lend him money. The loan was actually made in California, and the promissory notes, in addition to being executed and delivered in California, were also by their terms to be paid there. California, in other words, was both the place of making and the place of performance.

88. *Lilienthal*, 395 P.2d at 545.

89. The phrase “jurisdiction-selecting rule” was coined by Professor David Cavers and refers to a choice-of-law rule which uses a particular contact to select the state whose law is to govern without consideration of the content of the law so chosen. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933); DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* at 9 n.24 (1965) (“The jurisdiction-selecting rule makes a *state* the object of choice; in theory it is only after the rule has selected the governing state by reference to the ‘contact’ prescribed in the rule that the court ascertains the content of the state’s law.”).

90. *Lilienthal*, 395 P.2d at 545 (citing G. STUMBERG, *CONFLICT OF LAWS* 231 (3d ed. 1963)).

91. See, e.g., CAVERS, *supra* note 89; Cook, *supra* note 4; Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565 (1921).

The court cited various authorities, including a Tentative Draft of the Second Restatement, for the proposition that the validity of a promissory note was governed by the law of the place where payment was to be made.⁹²

Still another principle calling for the application of California law was the rule of validation—the idea that given a choice between a validating and an invalidating law, a court should choose the law that upholds the parties' agreement. The rule of validation, the court said,

is appealing because it is founded upon the same reasoning that is followed in other aspects of the law of contracts. This court and all other courts reiterate that contracts are "sacred and shall be enforced by the courts of justice unless some other overpowering rule of public policy intervenes which renders such agreement illegal or unenforceable. * * * Without such a rule the commerce of the world would soon lapse into a chaotic state." . . . In the general law of contracts we constantly strive to hold the contract valid and enforceable. The "rule of validation" has the same purpose in conflict of laws.⁹³

And to all of this the majority might just as well have added the dissenters' argument that California law would also apply under the approach then being pioneered by the New York Court of Appeals.⁹⁴ In 1954, that court discarded the traditional rule of *lex loci contractus* in favor of what it called the "center of gravity" or "grouping of contacts" approach.⁹⁵ This approach emphasized the law of the place "which has the most significant contacts with the matter in dispute"⁹⁶ in order to give that place "paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned

92. *Lilienthal*, 395 P.2d at 546 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332b(a) (Tentative Draft No. 6, 1960)).

93. *Id.* (citations omitted). According to the court, the rule of validation held that if the contract is valid under the law of any jurisdiction having significant connection with the contract, i.e., place of making, place of performance, etc., the law of that jurisdiction validating the contract will be applied. This would also agree with the intentions of the parties, if they had had any intentions in this regard. They must have intended their agreement to be valid.

Id.

94. *Id.* at 552 (Goodwin, J., dissenting).

95. *See Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954).

96. *Id.* at 102 (quoting *Rubin v. Irving Trust Co.*, 113 N.E.2d 424, 431 (N.Y. 1953)).

with the outcome of [the] particular litigation.”⁹⁷ These seductive sounding but somewhat imprecise phrases would soon find a reinforcing echo in the Second Restatement’s “most significant relationship” formulation. Whatever “significant contacts” were, exactly, it was pretty clear that California had them here.

It seemed that California law had to govern, yet the court avoided that conclusion. To understand how it managed to do this on a principled basis requires an understanding of the concept of interest analysis. Interest analysis had emerged on the scene only a few years earlier. It was a breakthrough in choice-of-law thinking at the time and has come to be recognized since as the most important theoretical advance in the area in this century. It was primarily the work of one man, Brainerd Currie, who proposed the idea and elaborated it in a series of influential law review articles that appeared between 1958 and 1963.⁹⁸ As conceived by Currie, interest analysis was a radically different way of looking at conflict-of-laws problems. It seemed to be the catalyst that the choice-of-law revolution needed and more than anything else was responsible for liberating choice-of-law from its territorial constraints. Interest analysis quickly became an important conflicts method in its own right as well as an integral component of almost all of the other modern approaches, the Second Restatement among them.

Currie’s method of analysis, in distilled form, ran along these lines. He began with several propositions that seem almost self-evident. Law makers, he said, ordinarily made rules of law with only the domestic situation in mind.⁹⁹ They were mainly concerned with events that happened within their own borders and with the activities of their own residents; they rarely gave thought to the extraterritorial consequences of those rules—that is, to how they would want them to apply in the marginal conflict-of-laws case.¹⁰⁰ All of these rules embodied or expressed some social, economic, or administrative policy¹⁰¹ which could be discovered through the familiar processes of statutory interpretation or case analysis.¹⁰² Having ascertained the policies embodied in the conflicting laws of two states, Currie said, a court should inquire whether the relationship of each state to the case was such that

97. *Id.* (quoting D. Martin Cook, Note, *Choice of Law Problems in Direct Actions Against Indemnification Insurers*, 3 UTAH L. REV. 490, 498–99 (1953)).

98. The major essays are collected in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

99. *See id.* at 81–86.

100. *See id.*

101. *See id.* 85–86, 141–46.

102. *See id.* 183–84.

applying its law would further or advance its policy.¹⁰³ If so, the state was said to have an “interest” in the application of its law.¹⁰⁴

It was hardly coincidental that one of the earliest and most influential of his articles—“*Married Women’s Contracts: A Study in Conflict-of-Laws Method*”¹⁰⁵—dealt with *Milliken*. It was a case rife with policy implications,¹⁰⁶ and Currie used it to demonstrate the inanity of the traditional territorial rules—*lex loci contractus*, of course, in particular. Taking as significant variables for choice-of-law purposes the states where the parties resided, the place where suit was brought, and the place of making of the contract,¹⁰⁷ he showed that of the fourteen possible conflict-of-laws problems that could arise, ten were false problems. They were false problems in the sense that while the *laws* of the two states were in conflict, the *policies* underlying them were not.¹⁰⁸

To illustrate this point, suppose that the residence of the parties were reversed in *Milliken*, with the contract made in Massachusetts at the place of business of the merchant and the suit brought in Maine where Sarah Pratt resided. The application of Massachusetts law called for by the place-of-making rule would subvert Maine’s policy of enforcing contracts and upholding commercial transactions; moreover, it would do so without any corresponding advancement of Massachusetts’ policy of protecting married women because Sarah Pratt, in this variation, would not be a Massachusetts married woman. Massachusetts, Currie argued, had no intention of protecting married women generally, but only those married women with whose

103. See generally CURRIE, *supra* note 98.

104. See *id.*

105. See generally Currie, *supra* note 91.

106. In order to sharpen his discussion of the conflicting legislative policies of Massachusetts and Maine, Currie asked his readers to assume that in 1870 the Massachusetts Legislature duly considered but refused to enact a bill that would have removed the contractual disabilities of married women. He appeared to think that the actual change made in 1874 brought the policies of the two states into alignment and destroyed any real conflict of interests. See CURRIE, *supra* note 98, at 80–81. The Massachusetts Supreme Judicial Court, however, did not appear to view the case in that light, although its decision was undoubtedly made easier by the change; rather, it considered the case on the basis of the laws as they existed in 1872 when the cause of action arose. What effect should a post-occurrence change in law have on a conflict-of-laws case? There is no definitive answer to this question. See, e.g., *id.* at 736–39; CRAMTON ET AL., *supra* note 3, at 275–77; Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 236–42 (1977); Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843 (1969).

107. See CURRIE, *supra* note 98, at 83.

108. See *id.* at 107.

welfare it was concerned—namely, Massachusetts married women.¹⁰⁹ In the terminology of interest analysis, Maine would have an interest in the application of its law upholding the contract because that would further its policy of security of transactions; Massachusetts would have no interest in the application of its rule invalidating certain married women's contracts because there was no Massachusetts married woman to protect. Maine would therefore be the only state with an interest in the application of its law. The place-of-making rule, blind to these kinds of considerations, would woodenly call for the application of Massachusetts law and would thus defeat the interests of both states.¹¹⁰

The other false problems in this group of ten were similar, though not always so perverse in defeating one state's interest without advancing the interest of the other. They were similar in that all were cases in which only *one* state was interested in the application of its law.¹¹¹ Currie then asked the obvious question: if a state had no interest in the application of its law, why apply it? That the place-of-making rule said so was hardly an answer. He conceded that the territorial rules, at least in theory, were uniform, certain, and predictable in operation and thus dissuasive of forum shopping, but he thought that systematic subversion of state interests was too high a price to pay for benefits that in practice were apt to be more illusory than real.¹¹² His own solution was simple: in a case of false conflict, a court should apply the law of the only interested state.¹¹³

This way of looking at a conflicts case was revolutionary, and conflict-of-laws has not been the same since Currie launched his withering attack on the inanity of invariant use of territorial rules in cases of false conflict. He told judges what they had instinctively known all along—that there was a rational way to dispose of these cases and to do so forthrightly, without resort to the subterfuge of escape devices.¹¹⁴ Today, virtually every modern approach to choice-of-law resolves false conflicts by applying the law of the only interested state.

109. *See id.* at 85–86.

110. *See id.* at 91.

111. *See id.* at 98.

112. CURRIE, *supra* note 98, at 98–107.

113. *Id.* at 184.

114. Courts dissatisfied with the inexorable operation of territorial rules, especially as laid down by Professor Beale in the First Restatement, showed considerable ingenuity in avoiding them when the occasion demanded. Characterization, the substance-procedure distinction, and the public policy exception were the principal techniques employed. *See, e.g., Southerland & Waxman, supra* note 1, at 458–69.

The remaining four of the fourteen possible cases, however, were qualitatively different. These were cases in which the conflict-of-laws was real. In these cases, both states were interested in the application of their laws, and it was therefore impossible to apply one state's law and advance its policy without simultaneously suppressing the policy of the other.¹¹⁵ *Milliken* was such a case, and, as we shall see, so was *Lilienthal*. In *Milliken*, the Massachusetts court could not apply the law of Maine, thereby advancing the policy of security of transactions, without at the same time sacrificing its own policy of protecting Massachusetts married women such as Sarah Pratt. One policy or the other had to yield. To Currie, true conflicts posed problems of uncommon difficulty. They were so difficult, in fact, that he said there was "no conceivable choice-of-law rule that will solve the problem, even though both states adopt it and consistently apply it."¹¹⁶ His own solution confounded a lot of people: "The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state."¹¹⁷

Currie characterized his proposal for resolving true conflicts as a "give-it-up attitude," arguing that such an attitude was the only constructive one when the task at hand was "impossible of accomplishment with the resources . . . available."¹¹⁸ He probably sensed that his proposal would not sit well with judges bred in the bold and innovative tradition of the common law and deeply committed, like the rest of the nation, to the belief that rational solutions exist and can be discovered for any problem, however thorny. In the event, he was right; his own solution has for the most part been ignored by courts and commentators in favor of approaches that either attempt to weigh one state's interest in the application of its law against another's or, in some other way, strike a comparative balance between the two.¹¹⁹ Yet Currie's considered judgment compels reflection, the more so as

115. See CURRIE, *supra* note 98, at 117.

116. *Id.* at 119.

117. *Id.*

118. *Id.* at 121.

119. See, e.g., CRAMTON ET AL., *supra* note 3, at 242; Korn, *supra* note 6, at 816–20. In her valuable article surveying existing choice-of-law approaches and their actual use by courts around the country, Professor Herma Hill Kay noted that "Currie's proposal that the forum court, as an instrument of state policy, should apply forum law to advance its own state's interests in true conflicts cases is unacceptable even to courts otherwise committed to interest analysis." Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 551 (1983). Two states, Kentucky and Michigan, have adopted a forum law

his objections to solutions of this kind have never, in my opinion, been adequately answered.

Conflicts of laws exist in the first place because, within very broad limits set by the Constitution, each state has sovereign power to determine for itself the legal consequences of acts or events that occur within its territory. Nothing in the Constitution prohibits different states from making the same kinds of determinations in different ways. Oregon may choose to treat contracts entered into by its spendthrifts as voidable if it wants to, while California may choose to treat the financially irresponsible like everybody else and hold them to their bargains. There is nothing startling in this. From a sovereign standpoint, neither state is wrong in the course it has chosen. Because both rules are equally correct, there can be no logical way to choose between them. Like choosing between apples and oranges, it is possible to prefer one over the other, but it makes no sense to say that one is "better." All that can logically be said is that the two laws and the policies they reflect are different.

Choosing law is always a legislative act, but never more profoundly so than in cases of true conflict. In these cases, the choice-of-law decision operates to nullify the valid legislative judgment of either one state or the other. It is a qualitatively different choice from the ones courts routinely make in domestic cases where there is only one "correct" rule of law. Currie argued that "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy."¹²⁰ As a matter of separation of powers, he did not think courts should perform this function, nor did he think they were equipped to, isolated as they were from legislative facts and lacking in the resources necessary to discover them.¹²¹ Though his forum-law solution has not been widely adopted, there is still nothing approaching general agreement about how true conflicts should be resolved. It is the most hotly debated issue in choice-of-law today.¹²²

The influence of Currie's ideas is plainly evident in the second half of the *Lilienthal* opinion, which began with a consideration of whether Ore-

solution for conflicts cases, but not "explicitly tied to an analysis of the policies underlying forum law." *Id.* at 561. Professor Kay's survey of judicial practice is updated in *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS D'ACADEMIE DU DROIT INT'L, 182-83 (1990).

120. CURRIE, *supra* note 98, at 182.

121. *See id.*

122. *See, e.g.,* CRAMTON ET AL., *supra* note 3, at 271-358.

gon's policy of protecting spendthrifts was sufficiently strongly held to warrant invoking the familiar public policy exception and refusing to give effect to the otherwise applicable law of California. Within the concept of "public policy," the court said

we must consider the economic and social interests of Oregon. When these factors are included in a consideration of whether the law of the forum should be applied this traditional approach is very similar to that advocated by many legal scholars. This latter theory is "that choice-of-law rules should rationally advance the policies or interests of the several states (or of the nations in the world community)."¹²³

In making this radical statement, the court was talking about interest analysis, as the citations to and about Currie's writings made clear.¹²⁴ For a definition of public policy, the court had traditionally relied on Justice Cardozo's classic statement that the law of another state would not be applied if to do so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."¹²⁵ But the trouble with this formulation, the court concluded, was that it was difficult to determine which policies were "fundamental" and which weren't because of the "lack of any even remotely objective standards."¹²⁶ Then came the turning point of the opinion:

[A]s previously stated, if we include in our search for the public policy of the forum a consideration of the various interests that the forum has in this litigation, we are guided by more definite criteria. In addition to the interests of the forum, we should consider the interests of the other jurisdictions which have some connection with the transaction.¹²⁷

The court found that Oregon's spendthrift policy was aimed at protecting the spendthrift's family, presumably an Oregon family, and at avoiding

123. *Lilienthal*, 395 P.2d at 547 (quoting Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 474 (1960)).

124. *See id.*

125. *Id.* (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918) (citations omitted)).

126. *Id.* at 548.

127. *Id.*

having to support the spendthrift and his family at public expense.¹²⁸ It also acknowledged Oregon's "strong policy favoring the validity and enforceability of contracts,"¹²⁹ regardless of where made, as well as one of protecting innocent persons from fraudulent conduct of the sort engaged in by Kaufman.¹³⁰ And of course it was in Oregon's interest to encourage persons from other states to transact business with Oregonians.¹³¹ Obviously these interests cut both ways, but the "substance of these commercial considerations," the court said, "is deflated by the recollection that the Oregon Legislature has determined, despite the weight of these considerations, that a spendthrift's contracts are voidable."¹³² California's most direct interest was in "having its citizen creditor paid."¹³³ It was California's policy "that any creditor, in California or otherwise, should be paid even though the debtor is a spendthrift."¹³⁴ And, like Oregon, California also wanted to be a state "in which contracts can be made and performance be promised with the certain knowledge that such contracts will be enforced."¹³⁵

This comprehensive analysis of underlying policies and interests led the court to the conclusion that it was dealing with a true conflict: "[w]e have, then, two jurisdictions, each with several close connections with the transaction, and each with a substantial interest, which will be served or thwarted, depending on which law is applied. The interests of neither jurisdiction are clearly more important than those of the other."¹³⁶ In such a case, the court thought, Oregon policy should prevail, and the law of Oregon should be applied. The rationale showed just how deeply in Currie's debt this court was:

Courts are instruments of state policy. The Oregon Legislature has adopted a policy to avoid possible hardship to an Oregon family of a spendthrift and to avoid possible expenditure of Oregon public funds which might occur if the spendthrift is required to pay his obligations. In litigation Oregon courts are the appropriate instrument to enforce this policy. The mechanical application of choice-of-law rules would be the only apparent reason for an Ore-

128. *Lilienthal*, 395 P.2d at 548-49.

129. *Id.* at 549.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Lilienthal*, 395 P.2d at 549.

134. *Id.*

135. *Id.*

136. *Id.*

gon court advancing the interests of California over the equally valid interests of Oregon. The present principles of conflict of laws are not favorable to such mechanical application.¹³⁷

Lilienthal was a remarkable decision in several respects. Despite the strength of California's ties to the case, the court's method of analysis, explicitly in terms of underlying policies and state interests, brought it to the recognition that it was dealing with a true conflict-of-laws—one in which it could not possibly advance the policies of one state without nullifying those of the other. Significantly, the court treated these interests as being of equal dignity. It made no pretense of reasoning its way out of the impasse by delving into the content of the laws in order to assess the wisdom of the policies that each expressed; it made no effort to assess the relative degree to which each state was attached to its policy or the strength with which it was held. It refused, in short, to weigh Oregon's interest in its rather special policy aimed at protecting the occasional spendthrift against the obviously strong interests both states shared in enforcing contracts and upholding commercial transactions. It recognized that the Oregon Legislature had already made that judgment and refused to substitute its own. In the end, this was not a case in which Oregon's spendthrift policy was characterized as "strongly held" and that familiar exception invoked as a ground for refusing to apply the otherwise applicable law of another state. It was a decision cast altogether in the entirely new mold of interest analysis.

The decision also gives a good indication of just how far choice-of-law had come in the slightly-less-than one hundred years since *Milliken* was decided in 1878. The choice-of-law revolution began to brew in earnest in the 1930s.¹³⁸ It was characterized by the increasingly scathing attacks of commentators on the rigid mechanization of conflicts rules that Beale's theories and his First Restatement imposed, and by a corresponding willingness on the part of distinguished courts to avoid those rules by invoking escape devices. It took Brainerd Currie and his synthesis of interest analysis, however, to catalyze smoldering discontent into full-blown revolution.

What Currie did, most decisively, was to restore prominence to a fact that territorial theory obscured: all laws reflect some policy and are intended to serve some purpose. He showed how destructive the traditional rules were of policies and purposes. By defining a state's interest in the applica-

137. *Id.*

138. The literature of conflict-of-laws is replete with accounts of the revolution. See, e.g., Korn, *supra* note 6, at 775–77; Southerland & Waxman, *supra* note 1, at 458–80.

tion of its law in terms of furthering the policy underlying it, he provided an intellectually satisfying way of identifying false conflicts and distinguishing them from true conflicts. The distinction, it turned out, was one between easy cases and hard cases. The simple and sensible disposition of the easy cases was almost self-evident: apply the law of the only interested state. For the hard cases, Currie had no ready answer, only the recognition that reasoned resolution was impossible and that a court, as an instrument of state policy, should do what it was constitutionally sworn to do, which was to uphold the policies and laws of its own state.

Territorial theory made the choice-of-law turn on a single event and the place where that happened. Currie demonstrated in graphic fashion just how irrelevant such a single connector could be when measured against the purposes and policies that laws were intended to serve. But even before his work appeared, there was widespread dissatisfaction with the rigid jurisdiction-selecting rules of territorial theory, particularly in their dogmatic 1934 Restatement by Beale. The discontent was by far most acute in the area of torts, whose whole underlying purpose had undergone drastic rethinking in the face of the spiraling costs of death and accident-related injury that rapid industrialization and technological growth had brought in their wake. Punishment and admonition gave way in the twentieth century to the compensation imperative. And here, in case after case, the inflexible place-of-injury rule frustrated the growing trend toward finding ways to compensate accident victims for their injuries.¹³⁹ By comparison, the pressure for change was far less intense in the area of contracts, where the dominant values—maintaining the security of transactions, effectuating party intentions, and protecting party expectations—seemed so well understood. These values did not change from one century to the next, and in the perception of many courts the familiar rules of territorial theory were adequate to subserve them.

This was true only to a point. As we have seen, *lex loci contractus*, loosely treated, did lend itself to value-oriented decision making more readily than its torts counterpart. But in a strict sense, it was not designed that way, and this was nowhere more evident than in the 1934 Restatement. In his effort to reduce conflicts law to an exact science and achieve the cherished virtues of certainty, predictability, and uniformity of result, Beale distinguished sharply between issues of contract validity and those of performance. He was adamant in insisting that where validity was the issue,

139. See, e.g., Southerland, *supra* note 5, at 786–90.

the law of the place of making had to govern; vested rights theory and logic required it. This was problematic for anyone who took the First Restatement as the final and definitive statement of territorial theory it was meant to be and who tried to follow its dictates literally. In the more closely knit, infinitely more mobile United States of the twentieth century, the place where a contract was made could easily be fortuitous, unrelated either to the parties themselves or to their transaction. This concern was evident in *Lilienthal* in the majority's qualification of its long-standing adherence to *lex loci contractus*. In such a world it was increasingly hard to see how any single connector could possibly be decisive.

In the First Restatement, Beale constructed the perfect machine for achieving conflicts justice—that is, for choosing the governing law in as fair and just a way as possible. He was indifferent to the result the law so chosen might produce in a given case. His uncompromising attitude was useful in a way, for it forced courts to confront the question whether perfect conflicts justice, according to Beale, was worth the price. Increasingly at mid-century the answer was no. Compared to end results that made good socio-economic sense, the attainment of logical rigor and with it the promised land of simple and easy application, certainty, predictability, and uniformity of result seemed secondary. This was especially true in the area of contracts where the “right” result—one that enforced contracts and protected party expectations—was usually uppermost in the minds of courts.

In the hundred years from *Milliken* to *Lilienthal*, the nation had changed. It had grown smaller, more interrelated and interwoven. Cataclysmic events—the Great Depression and World War II in particular—increased the power of the federal government at the expense of the states. They were sovereign still, but in a much diminished way. State lines no longer stood as high barriers to resolving cases in ways that seemed to make good sense. Territoriality itself was no longer talismanic. What was increasingly evident was a disposition on the part of courts to treat the choice-of-law decision as a means to an end rather than an end in itself.¹⁴⁰

The first real break with Beale's systematics came in 1954, when the New York Court of Appeals discarded territoriality and replaced it with the center-of-gravity or grouping-of-contacts approach.¹⁴¹ In its simplicity, the idea had to seem appealing: if a single contact such as the place of making was no longer to be decisive, then why not consider *all* of the contacts that the parties, their transaction, and the litigation had with the states con-

140. See, e.g., *id.* at 787–90, 811–14.

141. See *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

cerned? One state's contacts were almost bound to preponderate, and that would identify the state "most intimately concerned"¹⁴² with the outcome, hence the state whose law should govern. But this approach, as Currie and other critics would soon point out, had its own set of problems—chiefly, in Currie's estimation, its utter incompatibility with governmental interest analysis.¹⁴³

It was this period of turmoil, growth, and change that formed the matrix for the American Law Institute's second effort to restate the law of conflict-of-laws. With Columbia law professor Willis L.M. Reese as the Reporter, work began on the project in the early 1950s and continued for almost twenty years. The Second Restatement appeared in final form in 1971. In its many tentative drafts, it both influenced the choice-of-law revolution and in turn was influenced by it. A sense of the scope and magnitude of the undertaking, as well as of the forces that drove it, can be gathered from the comments of Herbert Wechsler, the Institute's director, in the "Introduction." The Second Restatement, he said:

[I]s a treatment that takes full account of the enormous change in dominant judicial thought respecting conflicts problems that has taken place in relatively recent years. The essence of that change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored. Such a transformation in the corpus of the law reduces certitude as well as certainty, posing a special problem in the process of restatement. Its solution lies in candid recognition that black-letter formulations often must consist of open-ended standards, gaining further content from reasoned elaboration in the comments and specific instances of application given there or in the notes of the Reporter. That technique is not unique to Conflicts but the situation here has called for its employment quite pervasively throughout these volumes. The result presents a striking contrast to the first Restatement in which dogma was so thoroughly enshrined.¹⁴⁴

Just how striking, we shall soon see. We can profitably turn at this point to the Second Restatement itself to see what it made of all the turmoil and

142. *Id.* at 102 (citation omitted).

143. See CURRIE, *supra* note 98, at 727–36.

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, vii (1971) [hereinafter RESTATEMENT (SECOND)].

change and how effectively its provisions deal with issues of contract and choice-of-law.

III. THE SECOND RESTATEMENT OF CONFLICT OF LAWS AND ITS APPROACH TO CASES IN CONTRACT

The Second Restatement is organized on a single fundamental principle. It is that rights and liabilities with respect to any given issue are determined by the law of the state which, with respect to that issue, has "the most significant relationship" to the occurrence and the parties.¹⁴⁵ This principle entirely supplants the vested-rights doctrine of the First Restatement, which, the Reporter says, "has not prevailed in the courts and is rejected" throughout.¹⁴⁶

Chapter 8 deals with contracts. It is subdivided into six topics, only the first of which—"Validity Of Contracts And Rights Created Thereby"—bears on the present discussion. This topic has three subparts. Title A states the "General Principles" and contains the all-important sections 187 and 188. Title B, comprising sections 189 to 197, deals with particular types of contracts, and Title C, sections 198 to 207, with particular issues in contract. Extensive comments follow each section, and they are of considerable help in understanding the black-letter rules. Particular note should be taken of the fact that these comments are "official," which is to say that they, like the black-letter rules themselves, have received the endorsement of the American Law Institute.¹⁴⁷ This was not true of the comments in the original Restatement.

One of the most important doctrinal changes made by the Second Restatement is in the area of party autonomy, which refers to the practice of allowing the parties to choose the law that will govern their agreement. American courts, it will be recalled, were quick to recognize this power in contracting parties and ratified it with a will in their decisions. The use of choice-of-law clauses became increasingly common in the twentieth century, particularly in contracts important enough to be drafted by attorneys. Beale opposed the concept and refused to incorporate it in the original Restatement, but his views on the subject were largely ignored by the courts.

Section 187 of the Second Restatement—stating one of the two "General Principles" which dominate the chapter on contracts—takes the

145. *See id.* at vii–viii.

146. *See id.* at 557 (ch. 8, Introductory Note).

147. *See id.* at viii.

eminently sensible approach and gives explicit recognition to the power of the parties to choose the governing law as long as there is a reasonable basis for their choice, as where the state chosen bears a "substantial relationship" either to the parties or the transaction.¹⁴⁸ For many years, the Supreme Court of Florida, following the well-known decision in *Seeman v. Philadelphia Warehouse Co.*,¹⁴⁹ has taken the position that the parties' choice of a particular state's law to govern their agreement will be upheld if the agreement bears a "normal and reasonable relation" to that state.¹⁵⁰ Section 187 is largely congruent with existing doctrine in Florida and would not be likely to effect the trend of decisions in this area if the Restatement approach were adopted here.¹⁵¹

Section 188, which states the second of the two "General Principles," is more problematic. This section deals with those cases that would formerly have been decided under the *lex loci contractus* doctrine—those in which the parties have made no attempt to choose their own law.¹⁵² Section 188(1)

148. *See id.* § 187. This section, entitled "Law of the State Chosen by the Parties" provides:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

RESTATEMENT (SECOND), *supra* note 144, § 187.

149. 274 U.S. 403 (1927).

150. *See Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So. 2d 1059, 1063 (Fla. 1981); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507, 512 (Fla. 1981).

151. *See Finch & Smeltzly*, *supra* note 27, at 282–84.

152. RESTATEMENT (SECOND), *supra* note 144, § 188. This section, entitled "Law Governing in Absence of Effective Choice by the Parties," provides:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the

provides that in the absence of an effective choice by the parties, their rights and duties with respect to an issue in contract are determined by the local law of the state having "the most significant relationship to the transaction and the parties under the principles stated in § 6."¹⁵³ Section 188(2) then lists five contacts that a court is to consider in applying the principles of section 6. These are the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the geographical location of the parties—their domicile, residence, place of incorporation, or place of business.¹⁵⁴

The reference to section 6 is a critical one. Section 6 is by far the most innovative and important section in the entire Restatement¹⁵⁵ and is applicable to choice-of-law in all areas.¹⁵⁶ Section 6(1) first directs a court to follow a statutory directive of its own state on choice-of-law if there is

most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (*see* § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

153. *See id.* § 188(1).

154. *See id.* § 188(2).

155. *See id.* § 6, entitled "Choice-of-Law Principles," which provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

156. *See id.* § 6(2) cmt. c.

one.¹⁵⁷ If there is none, which is typically the case, section 6(2) lists seven choice-influencing considerations that a court is to take into account in making its decision.¹⁵⁸ The comments say that the enumeration is not exclusive and that the factors are unranked and unweighted.¹⁵⁹ The seven factors are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.¹⁶⁰

The central theory of the Second Restatement, Professor Reese has written elsewhere, is that “the values stated in section 6 underlie the entire field of choice of law and that all of the black letter rules stem from these values.”¹⁶¹ The choice-influencing considerations of section 6, in other words, represent an attempt to distill those values that various courts and commentators at various times and places have thought to be of importance in the choice-of-law process.¹⁶² Professor Reese is quick to concede that in a given case these values may point in different directions and that from one area of law to another some may be of greater importance than others.¹⁶³ But “the fact remains that these are the values that underlie choice of law and that have guided the courts in their decisions.”¹⁶⁴ He believes that the ultimate success of the Restatement depends on the correctness of this perception.¹⁶⁵

157. RESTATEMENT (SECOND), *supra* note 144, § 6(1).

158. *Id.* § 6(2).

159. *Id.* § 6(2) cmt. c.

160. *Id.* § 6(2).

161. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 516 (1983).

162. *See id.* at 509.

163. *See id.* at 513.

164. *Id.*

165. *See id.* at 516–17.

The seven choice-influencing considerations of section 6 fall into five groups, each representing a distinct choice-of-law value.¹⁶⁶ The first of these comes mainly from section 6(2)(a)—“the needs of the interstate and international systems”—and is reminiscent of the ideas reflected in the principle of comity. It is a fundamental caution that a state should not ruthlessly pursue its own self-interest at the expense of another state or of the community of states. According to the comments, choice-of-law rules should “seek to further harmonious relations between states and to facilitate commercial intercourse between them. . . . [A] state should have regard for the needs and policies of other states and of the community of states.”¹⁶⁷ Rules that reflect this sensitivity and concern for the needs of other states, it is believed, will commend themselves for widespread adoption, and this, in turn, will promote the “certainty, predictability and uniformity of result” spoken of in section 6(2)(f).¹⁶⁸

The second value centers on interest analysis, which has a prominent place among the choice-influencing considerations of section 6. The provisions are sections 6(2)(b) and (c)—“the relevant policies of the forum” and “the relevant policies of other interested states”¹⁶⁹ These sections, Professor Reese has written, give “support to the views of Professor Brainerd Currie and of those other advocates of what is popularly referred to as the ‘governmental interest’ approach to choice of law.”¹⁷⁰ The comments that accompany these provisions are strongly reminiscent of Currie:

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made. . . .

166. See RESTATEMENT (SECOND), *supra* note 144, § 188(1) cmt. b; Reese, *supra* note 161, at 508–13.

167. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. d.

168. See *id.* § 6(2)(f).

169. *Id.* § 6(2)(b)–(c).

170. Reese, *supra* note 161, at 509.

... [T]he forum should give consideration not only to its own relevant policies . . . but also to the relevant policies of all other interested states.¹⁷¹

The third value is concerned with the needs of the parties and is reflected in sections 6(2)(d), “the protection of justified expectations,”¹⁷² and 6(2)(f), “certainty, predictability and uniformity of result.”¹⁷³ This value is obviously of pre-eminent importance in the area of contracts¹⁷⁴ and in this context gains support from the fourth value, which is stated in section 6(2)(e), “the basic policies underlying the particular field of law.”¹⁷⁵ The comments to section 188(1) say flatly that “[p]rotection of the justified expectations of the parties is the basic policy underlying the field of contracts.”¹⁷⁶ The fifth value concerns the needs of judicial administration and is reflected mainly in section 6(2)(g), “ease in the determination and application of the law to be applied.”¹⁷⁷

Section 188, read in conjunction with the principles and values of section 6, obviously invites an open-ended policy analysis of the broadest sort in determining the state whose relationship to the transaction and the parties is “most significant.” Considering that the Restatement nowhere defines a “significant” relationship or differentiates it from one that is not significant, the calculus called for by these two sections may strike some as intolerably vague and uncertain. But the sections immediately following section 188, which deal with particular types of contracts and particular issues in contract, attempt to dispel some of the uncertainty. Though the general principle of section 188 is “applicable to all contracts and to all issues in contract,”¹⁷⁸ the Reporter nevertheless believes it possible, “on the basis of existing knowledge, to lay down more precise rules for determining the state of the applicable law. . . . It seems clear that the best way to bring precision into the field is by attempting to state special rules for particular contracts and for particular issues.”¹⁷⁹ Or put more bluntly, the wonderfully open-ended, policy-oriented approach of sections 6 and 188 collapses for

171. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmts. e–f.

172. *Id.* § 6(2)(d).

173. *Id.* § 6(2)(f).

174. *See* Reese, *supra* note 161, at 511–12.

175. RESTATEMENT (SECOND), *supra* note 144, § 6(2)(e).

176. *Id.* § 188(1) cmt. b.

177. *Id.* § 6(2)(g).

178. *Id.* § 186 cmt. a.

179. *Id.*

particular types of contracts and issues in contract into a series of presumptive rules as to the state of most significant relationship.

With respect to particular types of contracts, the Reporter believes it possible from existing experience to state that a "particular contact plays an especially important role in the determination of the state of applicable law."¹⁸⁰ The rules stated in these specific sections presume, in other words, that a state having a certain geographical connection or contact with a case will ordinarily be the state of most significant relationship. These are of course jurisdiction-selecting rules, and in their territorial bias they are strikingly similar to the traditional approach under the *lex loci contractus* doctrine.

Here, for particular types of contracts, are the important contacts and resultant presumptions as to the state of most significant relationship: for contracts involving transfers of interests in land, the state where the land is situated;¹⁸¹ for contracts for the sale of a chattel, the state where the seller is to deliver;¹⁸² for life insurance contracts, the state where the insured was domiciled at the time the policy was applied for;¹⁸³ for contracts of fire, surety, or casualty insurance, the state where the parties understood the principal location of the insured risk to be;¹⁸⁴ for contracts of suretyship, the state whose law governs the principal obligation;¹⁸⁵ for contracts for the repayment of money lent, the state where the contract requires repayment;¹⁸⁶ for contracts for the rendition of services, the state where the services are to be rendered;¹⁸⁷ and for contracts of transportation, the state from which the passenger departs or the goods are dispatched.¹⁸⁸ It is important to bear in mind that these rules are presumptions only. Each section contains the explicit qualification that the presumption is subject to displacement if some other state has "a more significant relationship" to the transaction and the parties "under the principles stated in § 6."¹⁸⁹

180. RESTATEMENT (SECOND), *supra* note 144, § 189 (Title B, Introductory Note) .

181. *Id.* §§ 189, 190.

182. *Id.* § 191.

183. *Id.* § 192.

184. *Id.* § 193.

185. RESTATEMENT (SECOND), *supra* note 144, § 194.

186. *Id.* § 195.

187. *Id.* § 196.

188. *Id.* § 197.

189. *See, e.g., id.* § 195. This section provides:

The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be

Particular issues in contract receive considerably less categorical treatment. Some of the rules simply state that an issue is to be determined by the law selected by application of the general principle of section 188. Issues in this group are those which concern the validity of a contract in respects other than capacity and formalities;¹⁹⁰ the effect on a contract of misrepresentation, duress, undue influence, and mistake;¹⁹¹ the construction of words used in a contract;¹⁹² the nature and extent of the rights and duties created by a contract;¹⁹³ and the measure of recovery for a breach of contract.¹⁹⁴ Others are in two parts, the first part stating that the issue is to be determined by application of the rule of section 188, the second then offering a tentative suggestion as to what the result of such application would ordinarily be. Thus, a party's contractual capacity will be upheld if she has such capacity under the law of her domicile;¹⁹⁵ formalities meeting the requirements of the place of execution "will usually be acceptable";¹⁹⁶ and contracts calling for performance which is illegal in the place of performance "will usually be denied enforcement."¹⁹⁷

Additionally, two issues are singled out for special treatment: usury and details of performance. Section 203 provides that a contract will be upheld against a charge of usury "if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted" by the law of the state that would otherwise have the most significant relationship under section 188.¹⁹⁸ And section 206 states that "[i]ssues relating to details of performance . . . are determined by the local law of the place of performance."¹⁹⁹

I think it is important to stress that the general approach of the Restatement aims at identifying the state of most significant relationship under sections 6 and 188. The presumptions and suggested answers of the specific

made, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND), *supra* note 144, § 195.

190. *Id.* § 200.

191. *Id.* § 201.

192. *Id.* § 204.

193. *Id.* § 205.

194. RESTATEMENT (SECOND), *supra* note 144, § 207.

195. *Id.* § 198(2).

196. *Id.* § 199(2).

197. *Id.* § 202(2).

198. *Id.* § 203.

199. RESTATEMENT (SECOND), § 206.

sections are simply the Reporter's view of the result that would usually follow from using that approach. For particular types of contracts, all of the presumptions are subject to displacement if some other state has a more significant relationship to the parties and the transaction under the principles stated in section 6, and most of the particular issues are determined by the law selected by application of section 188. It is obviously important to understand just how a court should go about identifying the state of most significant relationship using sections 6 and 188.

Section 188(2) says that the five enumerated contacts are to be taken into account in applying the principles of section 6 to determine the applicable law. But exactly how do sections 6 and 188 interrelate? The comments to section 188 offer considerable guidance on this point. The comment to section 188(2) states that

the forum, in applying the principles of § 6 to determine the state of most significant relationship, should give consideration to the relevant policies of all potentially interested states and the relative interests of those states in the decision of the particular issue. The states which are most likely to be interested are those which have one or more of the following [five] contacts with the transaction or the parties.²⁰⁰

This language is an obvious reference to the interest analysis provisions of section 6—section 6(2)(b) and (c). The comment to section 188(1) makes this clear by saying that these two principles of section 6 focus “upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors . . . are at times referred to as ‘state interests’ or as appertaining to an ‘interested state.’”²⁰¹ The five contacts, then, are important not in themselves, but because of the likelihood that a state having one or more of these contacts with the parties or the transaction will have an interest in the application of its law.

The appropriate starting point is therefore with the interest analysis provisions of section 6. A court should first identify the relevant policy underlying the law of each state having one or more of the five contacts with the case. It should then ask whether that state's policy would be furthered by application of its law. If the answer is yes, that state will be interested in the

200. *Id.* § 188(2) cmt. e.

201. *Id.* § 188(1) cmt. b.

application of its law. The majority of cases, as Currie demonstrated, will be false conflicts because only one state will have such an interest.²⁰² In that event, the only interested state will presumably be the state of most significant relationship. The comments to section 6 say that a state's interest in the application of its law is a "weighty reason" favoring such application.²⁰³ They do not actually state the converse proposition—that courts should not apply the law of a state having no interest in such application—but there can be little doubt that the basic philosophy of the Restatement, in common with most of the other modern approaches, is to resolve false conflicts by application of the law of the only interested state. Professor Reese has said elsewhere that "a court should seek to avoid applying a law whose underlying policy would not be served by such application."²⁰⁴

This is certainly the easiest and most practical way to proceed. The interest analysis provisions of section 6 may, without more, identify the state of most significant relationship; if the conflict is false, the only interested state will be that state. This, in turn, makes it unnecessary to consider the other choice-influencing considerations of section 6 or to consult any of the sections dealing with particular types of contracts and issues in contract since the interest analysis principles of section 6 will have overridden any contrary result that these sections might call for.

Up to this point, the method of the Restatement is clear enough. Matters become more complex, however, if the interest analysis called for by sections 6(2)(b) and (c) reveals that both states are interested in the application of their laws—a true conflict, in other words. The comments to section 6 say that the state whose interests are "most deeply affected" should have its law applied,²⁰⁵ but nothing is said, there or elsewhere, about how this determination is to be made. The Restatement leaves a court at this point with a jumble of contacts, principles, policy-oriented provisions, and jurisdiction-selecting rules to sort through and no guidance on how to do it.

One thing seems clear. The Restatement invites a court to do what Brainerd Currie said neither could nor should be done, and that is to weigh or compare the respective interests of two states in the application of their

202. See CURRIE, *supra* note 98, at 107.

203. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. e.

204. Reese, *supra* note 161, at 510 (citation omitted). See, e.g., CRAMTON ET AL., *supra* note 3, at 245–51; SCOLES & HAY, *supra* note 60, at 583–88; William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 647–48 & n.12 (1983); see generally CRAMTON ET AL., *supra* note 3, at 193–379 (summarizing principal modern approaches); SCOLES & HAY, *supra* note 60, at 15–41.

205. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. f.

laws. Currie, whose proposal it first was that conflicts cases be analyzed in terms of governmental interests, deplored the weighing of interests as a way of choosing between the competing laws and policies of two states. If both states were interested, he said, no one, not even the Supreme Court, was in a position to say which state's policies were "the more important, or the more deserving, or the more enlightened."²⁰⁶ Yet the Restatement's most basic premise—that for every case there is a state of most significant relationship—requires a court to make this relative judgment. Any state interested in the application of its law will have a significant relationship to a case. If two states have such a relationship, there appears to be no escape from determining in some way that one state's relationship is more significant than the other's. In effect, the Restatement assumes its own conclusion: one state's relationship must be *more* significant than another's because there must be a state of most significant relationship.

The Restatement's failure to say how a court is supposed to make this determination opens a Pandora's box of possibilities. Courts as unimpressed with Currie's arguments as the Reporter, apparently will undoubtedly try to assess the degree to which the interested states are attached to the policies embodied in their laws as a measure of whose interests are "most deeply affected."²⁰⁷ Some policies will no doubt strike some courts as more strongly held than others, but this will necessarily be an individual and highly subjective judgment, much like that involved with traditional methods in deciding whether to invoke the public policy exception. In practice it has proven difficult enough for a forum court to make that judgment with respect to its own state's public policy,²⁰⁸ much less compare its degree of "strength" with that of another state in any meaningful way.

206. CURRIE, *supra* note 98, at 117.

207. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. f.

208. In *Lilienthal v. Kaufman*, 395 P.2d 543, 548 (Or. 1964), Justice Denecke made the following, refreshingly candid observation:

The difficulty in deciding what is the fundamental law forming a cornerstone of the forum's jurisprudence and what is not such fundamental law, thus allowing it to give way to foreign law, is caused by the lack of any even remotely objective standards. Former limitations on the capacity of married women to contract illustrate the difficulty. *Milliken v. Pratt*, 125 Mass. 374 (1878), is used in many case books as an example. There, the Massachusetts court held that the Massachusetts law that a Massachusetts married woman was incapable of contracting as a surety was not such a cornerstone of Massachusetts jurisprudence and economy that Maine law to the contrary could not be applicable. However, in *Union Trust Co. v. Grosman*, 245 U.S. 412 (1918), Mr. Justice Holmes, writing for the court, held that a similar Texas limitation on a Texas married woman

In this sort of calculus, policies that coincide with a court's own sense of values are likely to appear more strongly held than those that do not, and it will be tempting to credit a state with little attachment to a policy that seems wrong-headed or archaic or that is plainly on its way out, as was the case with Massachusetts's protective policy in *Milliken v. Pratt*.²⁰⁹ It will also be difficult for a court to ignore the result that application of the one law or the other will produce in a given case, for once the content of competing laws is taken into account, weighing interests almost inevitably shades into weighing results. Courts that think they know a good socio-economic result when they see one will have a field day with the Restatement's "most deeply affected"²¹⁰ formulation.

Another possibility is contact counting. New York's adoption of the "grouping of contacts" approach has had a fair measure of influence with other courts.²¹¹ This approach counts "significant contacts" in an attempt to locate the state "having the most interest in the problem" or "most intimately concerned with the outcome."²¹² Its simple arithmetic creates an aura of objectivity that courts, unwilling to engage in the unseemly business of interest weighing, may find appealing. Although the similarity in terminology makes it easy to guess that the Reporter took a few leaves from New York's book in designing the Second Restatement, the comments to section 188(2) never say that the five contacts of the section are quantitatively important; they are important only because they are likely to be the ones that implicate a state's interest in the application of its law under the principles of section 6. "Interest" in this sense means that the relevant policies embodied in the law would be furthered by its application. A state is either interested or it is not—not more or less interested depending on the number

was such an integral part of Texas policy that the Illinois law to the contrary would not be enforced in a Texas court.

Compare *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967) (holding that the historical absence of any limitation on wrongful death damages in the Florida wrongful death statute fails to reflect strongly held public policy), with *Gillen v. United Services Auto. Ass'n*, 300 So. 2d 3 (Fla. 1974) (holding that the statutory prohibition of "other insurance" clauses in automobile insurance policies issued in Florida reflects strongly held public policy).

209. 125 Mass. 374 (1878).

210. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. f.

211. See, e.g., SCOLLES & HAY, *supra* note 60, at 691–93 ("[A] significant number [of states] have adopted the more flexible center-of-gravity approach or that of the Second Restatement"); Kay, *supra* note 119, at 535 ("North Dakota appears to be the only state that has adopted New York's center of gravity approach without merging it into the 'most significant relationship' doctrine of the Restatement Second."). See generally *id.* at 525–38.

212. *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) (citations omitted).

of contacts it has with a case. All the same, confronted with a true conflict of interests and stuck for a way to break the tie, some courts will turn to contact counting in the intuitively appealing if analytically superficial belief that the interests of the state with the most contacts must be those that are "most deeply affected."²¹³

For courts that understand Currie's objections and take them seriously, the inexorable demand of the Restatement to locate the state of most significant relationship will pose a thornier dilemma. Currie's own proposal—that the forum apply its own law in a case of true conflict—was essentially arbitrary, intended for a problem not capable of solution with the resources at hand, but for which a solution nevertheless had to be found. *Lilienthal* is a perfect example, but few courts have followed its lead,²¹⁴ apparently regarding a forum-law solution as too self-serving to commend itself as a settled rule of decision. Certainly the Restatement lends no support to Currie's proposal, but it does contain other possibilities for courts that value arbitrary solutions in preference to the "apples and oranges" comparison involved in interest weighing.

Professor Russell Weintraub has proposed that true conflicts be resolved by applying the law that validates the parties' agreement.²¹⁵ "It makes sense," he says, "to have a choice-of-law rule in accord with widely shared and clearly discernible trends in the domestic laws whose conflicts we are trying to resolve."²¹⁶ In this, of course, he draws on the near-sacrosanct status that contracts have enjoyed throughout the nation's history and the well-known predilection of courts for enforcing them wherever possible. Ample support for this result—essentially that argued for by all proponents of the rule of validation²¹⁷—can be found in the principles of section 6. Choosing the validating law protects the justified expectations of the parties and serves their need for certainty and predictability. This in turn

213. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. f.

214. *See Kay, supra* note 119, at 551.

215. *See WEINTRAUB, supra* note 52, at 386–98. His proposal is more complex than the statement in the text suggests; it is limited to questions of contract validity and is intended to operate as a presumption subject to rebuttal in certain cases. "[F]acilitating the planning of interstate and international commercial transactions," he says, "is far better served by a rebuttable presumption that the contract will be valid under the local law of any contact state provided that the validating policies underlying that law will be advanced by application to the interstate transaction in issue." *Id.* at 387.

216. *Id.* at 359 (referencing torts cases); *see also id.* at 388.

217. *See, e.g., EHRENZWEIG, supra* note 63, at 465–90; STUMBERG, *supra* note 90, at 237–39.

further the basic policy underlying the field of contract law. Such an approach is simple and easy to use and, considering that most cases have come out this way anyhow, could hardly cause disruption in the smooth workings of the interstate system.

The other obvious possibility is simply a default reference to the presumptions and suggested answers of the sections that follow section 188. These black-letter rules represent the Reporter's attempt to distill for each kind of contract and issue in contract the one particular territorial contact that courts themselves have tended to emphasize in their choice-of-law determinations. Since many of the decisions from which these rules derive were made with territorial methods, it is not surprising to find the place of contracting and the place of performance figuring prominently as the important contacts. The net effect, somewhat ironically, is a more highly refined and particularized version of the *lex loci contractus* doctrine. The territorial bias of these sections reflects the Reporter's own view of the profound and continuing importance of territoriality in conflicts thinking. He has said elsewhere that to ignore the significance of territoriality is "to ignore the basic reason for the existence of choice of law."²¹⁸ These sections also reflect his personal preference for a rule-based approach rather than one that is open-ended and policy-oriented.²¹⁹

For some, perhaps many courts, the appeal of an approach of this sort should not be underestimated. In saying this, I have in mind the kind of court that might approach a case in this way.²²⁰ Suppose it has determined through the interest analysis provisions of section 6 that both states are legitimately interested in the application of their laws. It recognizes, with Currie, that it is in no position to "weigh" these conflicting interests. It cannot say that one state is more deeply committed than the other to the policies embodied in its law, or that the policies of one are more strongly held or are somehow better, wiser, or more important than the other. Contact counting strikes it as too simplistic, subjective, and uncertain. Contacts, after all, can be multiplied and manipulated, and in practice

218. Reese, *supra* note 161, at 514.

219. See Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

220. In discussing choice-of-law methodology, I assume throughout, for the sake of simplicity, that only two states are involved and that the action is brought in the courts of one of them. This is in fact far more often the case than not. But it is of course possible that a conflicts case can involve more than two states, and it is also possible that the forum will be "disinterested"—that is, its only connection with the case is that the parties have chosen to litigate there.

someone has to decide which ones are to be counted, whether some are more important than others, and what happens if the contacts are more or less evenly divided between the two states.

What the court feels the need for at this point is an arbitrary solution. It wants a way of deciding that does not involve the appearance of deciding. Its instinct, however, is for a method that will be as impartial and free from bias as possible, much like the simple toss of a coin. Hence, it rejects both Currie's and Weintraub's proposals because, though arbitrary, each takes a bias already present in these cases—one favoring application of forum law, the other favoring the law that would validate the contract—and reintroduces it into the process as a basis of decision. Like many courts, this court also happens to be busy and overworked. With its crowded docket, it has neither the time nor the inclination to make a "three-dimensional chess game"²²¹ of these cases. It wants a quick, simple, and easy way to dispose of the case before it and all others likely to arise, both for its own sake and that of the lower courts who look to it for guidance. With a view to minimizing rather than encouraging litigation, it wants a method that is certain and predictable so that affected parties can suitably orient their actions and attorneys can advise their clients with confidence. What this court wants, in short, is a simple and easy-to-use approach that will be impartial in operation, certain, and predictable in result. For these purposes the black-letter rules of the specific sections should do nicely.

I want to emphasize that the suggested use of the Restatement in this way is intended only for true conflict resolution. The first step in any case should always be to determine the nature of the conflict by relating the contacts of section 188(2) to the interest analysis provisions of section 6. If the conflict is false, the law of the only interested state should be applied. Only if it is true should the territorial contact identified in the appropriate specific section be used and then only for the limited purpose of providing an arbitrary way of resolving the conflict.

The Reporter supports his choice of particular contacts with a rationale in the comments that accompany each black-letter rule, often to the extent of saying that a certain state, by virtue of its territorial connection, is likely to have a "dominant" or "natural" interest in the determination of an issue.²²² This line of thought revives the territorial bias of the original Restatement in an unfortunate way, attaching as it does near-talismanic significance to some

221. Rosenberg, *supra* note 81, at 644.

222. See, e.g., RESTATEMENT (SECOND), *supra* note 144, § 192 cmt. c (dominant interest); *id.* § 193 cmt. c (natural interest); *id.* § 196 cmt. c (natural interest).

one particular contact. The danger is that the state with the identified contact may have no interest in the application of its law. A court can miss this important point altogether if it omits the interest analysis step and simply consults the black-letter rules directly. The point here has nothing to do with the soundness of the Reporter's reasons for singling out a particular contact; it is that those reasons, sound or otherwise, are essentially irrelevant when the black-letter rules are used as default solutions for cases of true conflict.

If all of this seems complex, it is a complexity inherent in the design of the Restatement. Obviously it is not the monolith its predecessor was. It is an agglomeration of just about every approach to choice-of-law that anyone has ever thought of, and its eclectic assortment of contacts, principles, policy-oriented provisions, and jurisdiction-selecting rules can accommodate just about any approach a court might want to take. It is like an Erector set with no directions. The only attempt at a unifying conception is the notion of "a state of most significant relationship," yet that term is never defined. Interest analysis is a major component, but its function and importance in relation to other components are left unclear. In particular, no guidance is provided for the critical case where each of two concerned states is legitimately interested in the application of its law. There is only the unhelpful assurance that one state must be more interested than the other because there must be a state of most significant relationship. How that determination is to be made is never specified. Nowhere does the Restatement confront Currie's central insight that a court of one state may have no business in making that sort of relative judgment between its own law and policy and that of another state.

Let me illustrate these concerns by returning to *Lilienthal* in order to consider how a court might work through the Second Restatement in deciding that case. It would probably start by referring to section 195, which deals with "contracts for the repayment of money lent."²²³ That section states that the governing law is that of the state "where the contract requires that repayment be made,"²²⁴ which in this case would be California. Ergo, the contract is valid and should be enforced against Kaufman, the Oregon spendthrift. With this, we are essentially back to the traditional territorial approach—albeit in a more refined version—and all the simplicity, ease, certainty, and predictability that it affords. Some courts have taken just this

223. *See id.* § 195.

224. *Id.*

approach, using the black-letter rules to the exclusion of everything else.²²⁵ But there is a catch if the court reads carefully. Section 195 directs it to apply California law unless some other state has a more significant relationship to the transaction and the parties under the principles of section 6.²²⁶ What is a "significant relationship"? The term is not defined. Does California have one, or Oregon either, for that matter?

In search of guidance, the court might turn back to the general principle of section 188(1), which only repeats the admonition to apply the law of the state having the most significant relationship to the transaction and the parties under the principles of section 6.²²⁷ Section 188(2) is more specific. It says that in applying those principles, the court should take account of five contacts.²²⁸ California has four. They are the place of contracting, the place of negotiation, the place of performance, and the domicile of the lender. Oregon has, at most, two. They are the location of the subject matter of the contract—presumably the money lent—and also the domicile of the debtor.

But quantity is not the issue. The comments instruct the court, in applying the principles of section 6, to consider the relevant policies of all potentially interested states.²²⁹ They add that the states "likely to be interested are those...hav[ing] one or more" of the five contacts with the transaction or the parties.²³⁰ California's policy is one of security of transactions. Application of its law would further that policy by enforcing the contract and thereby insuring that its resident creditor is paid. Oregon is likewise an interested state. Its legislatively determined policy is one of protecting resident spendthrifts by relieving them of their contractual obligations. Application of Oregon law would plainly serve that end.

What now? Both states are interested states. The comments to section 6 say that generally the law of the state whose interests are "most deeply affected" should be applied,²³¹ but unfortunately there are no directions on how to make this determination. Nor is there anything to warn the court that perhaps it is not its proper role to say that policies arrived at by its own

225. See CRAMTON ET AL., *supra* note 28, at 132 ("Other courts essentially end their analysis with the rules: little or no attention is paid to § 6, and instead the court makes the presumption effectively irrebuttable. For these courts the Second Restatement is little more than an updated version of the first.").

226. See RESTATEMENT (SECOND), *supra* note 144, § 195.

227. See *id.* § 188(1).

228. See *id.* § 188(2).

229. See *id.* cmt. e.

230. *Id.*

231. See RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. f.

legislature after full debate and consideration should yield to those of California, or, for that matter, that California's should yield to Oregon's. Some sort of resolution, of course, is not hard to come by. The point is that the result reached, whatever it is, will necessarily represent a subjective judgment that depends far more on the court's attitude and temperament than on anything contained in the Restatement.

Compelled by the Restatement to make this relative judgment, how should the court go about it? It knows, of course, that both Oregon and California share a strong interest in the security of transactions, which in this context means that contractual obligations should be enforced and, more specifically, that debtors should be required to pay their debts. But the Oregon Legislature, though well aware of this precept and generally in full agreement with it, has nevertheless seen fit to carve out a special exception for a discrete group of Oregonians who, by reason of psychiatric or personality disorder, cannot control their compulsion to spend money. For their own protection and the protection of those close to them, the legislature has empowered courts to declare such persons spendthrifts, the practical effect of which is to deprive them of the power to enter into valid contracts.

In other words, the Oregon Legislature has already struck the very balance that the court is wrestling with: for the special class of persons known as spendthrifts, it has determined that Oregon's interest in protecting them takes priority over its more general interest in enforcing contracts. The court also knows that the number of Oregonian spendthrifts is small, especially in relation to the number of potential debtors, and that it will not be called upon very often to depart from the normal practice in order to protect them. Enforcing the contract will therefore have a much greater impact on the policy of protecting spendthrifts than not enforcing it will have on the policy of security of transactions.²³² Not only would enforcement deal a serious blow to Oregon's protective scheme, but it would also require the court to second-guess the legislature in order to do it. From this sort of perspective, Oregon's interests might well strike the court as more deeply affected than California's interests.

On the other hand, consider how easily a court with a different set of values could reach the opposite result. It could reinforce California's interest in the application of its law by counting contacts and concluding that it is the center of gravity, hence the state most intimately concerned with the outcome and, thus, the state whose interests are most deeply affected. Or it

232. See Kramer, *supra* note 87, at 323-24.

could bring into play the other choice-influencing considerations of section 6, which, for contracts cases, boil down to enforcing agreements in order to protect the justified expectations of the parties, thereby promoting certainty and predictability and insuring that the interstate system continues to hum along. Alternatively, if already at odds with its legislature, it could sniff condescendingly and point out that Oregon's spendthrift policy is a legislative aberration, undoubtedly intended only for home consumption, and therefore weak in comparison with California's policy of enforcing contractual obligations. California has a policy shared, not coincidentally, by Oregon as well as most other states in the United States. On the other hand, it could simply acknowledge the impasse and break the tie in an arbitrary way with section 195's presumption that the governing law is that of California, the state where the money was to be repaid.

Ironically, the one solution not readily available to a Second Restatement court is the one actually adopted in *Lilienthal*. The Restatement requires a court to determine that one state's relationship is more significant than another's and then in some way to rationalize that determination. For a court that thinks like the *Lilienthal* court, this will necessitate a degree of dishonesty, or at least sophistry, for it will not be able to say, as the Oregon Supreme Court did, that the policies of both states are important and would be equally affected by non-application of their respective laws. Nor will it be able to acknowledge forthrightly that it is an instrument of state policy with a sworn constitutional duty to uphold the laws and policies of its own state wherever possible.

It seems obvious that value judgments are involved here. To some courts, separation-of-powers and role-and-function concerns will carry little weight. It will not matter that they are dealing with the laws of two sovereigns; they will be only too happy to engage in the familiar task of weighing and balancing competing considerations of social and economic interest to reach what they think is a sound result, just as if the case were a run-of-the-mill domestic one. Others may take pause, struck with the seriousness of what it means to have to nullify, if only for one case, the laws and policies of their own state. It is a decision as profound in its way as one declaring a statute unconstitutional, and they will not be happy making it just because the Restatement says so.

IV. TEMPERAMENT AND ATTITUDE IN THE FLORIDA COURT'S DECISION MAKING IN CHOICE-OF-LAW CASES

The Restatement's assortment of riches makes it an extraordinarily flexible instrument for the resolution of conflicts problems. It contains something for everybody, and it is not surprising that it has become the most popular of the modern approaches as a replacement for traditional methods.²³³ A number of commentators have pointed out, however, that the results it has produced around the country thus far have not been noticeably certain, predictable, or uniform, or even very satisfactory;²³⁴ rather, they bear out the assertion that the use that any particular court makes of the Restatement is more likely to depend on what it values in a choice-of-law method than on the Restatement itself.

In considering the desirability of extending the Restatement approach in Florida, the most pertinent question to ask, it seems to me, is what the Supreme Court of Florida values in a choice-of-law method. Obviously there can be no definitive answer to this question. The court's membership has changed frequently over time,²³⁵ and what it has done in the past is no guarantee of what it will do in the future. All the same, there are marked indications of attitude and temperament in the court's pattern of decision making in conflicts cases over the years, especially in the torts cases it has decided thus far with the approach of the Second Restatement. An examination of this history in some detail should prove instructive.

Drama in the conflicts arena usually comes when a court manipulates the choice-of-law decision in order to produce what it obviously thinks is the right result for the case before it. The bolder and more imaginative the manipulation, the better, as witness the conjuring-act quality of the best of

233. See, e.g., WEINTRAUB, *supra* note 52, at 377 & n.43; Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 129-33 (1992).

234. See, e.g., Kay, *supra* note 119, at 558-62; Kramer, *supra* note 29, at 466, 486-89; Laycock, *supra* note 29, at 253; Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 327-28 (1972); Singer, *supra* note 29, at 77.

235. Of the seven justices who participated in the 1980 decision in *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980), in which the court adopted the Second Restatement approach for torts cases, only two Justices, Justices Overton and McDonald, were still on the court in 1988 when *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988) was decided. Of the justices who participated in that decision, four Justices, Chief Justice Kogan and Justices Grimes, Shaw, and Overton remain on the court today.

Justice Roger Traynor's opinions for the California Supreme Court.²³⁶ But if that sort of performance has been the stuff of soap opera, then the Supreme Court of Florida's opinions, by comparison, have tended to resemble the weather report on the nightly news.

The most innovative of these was, undoubtedly, Justice Robert's short-lived 1967 opinion in *Hopkins v. Lockheed Aircraft Corp.*,²³⁷ a case arising out of the death of a Florida resident in an airline crash in Illinois. In the ensuing wrongful death action, brought in federal court in Tampa and sounding in both tort and contract, the Supreme Court of Florida was asked by way of certified question to say whether Florida, for reasons of public policy or otherwise, would refuse to apply an Illinois limitation on wrongful death damages, Florida having none.²³⁸

Writing for five members of the court, Justice Roberts found in earlier cases a strongly expressed policy of giving "primary consideration, in choice-of-law cases, to the public policy—legislative as well as organic—or 'any salutary interest' of this state and to decline to enforce a foreign law when contrary thereto . . ."²³⁹ But he did not stop with that. He went on to declare that "the strict *lex loci delicti* rule should be abandoned in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court."²⁴⁰ He quoted with apparent approval the "most significant relationship" principle from a tentative draft of the Second Restatement²⁴¹ and stressed the importance of analyzing:

[T]he policies underlying and the purpose of the conflicting laws and of the relationship of the occurrence and of the parties to such policies and purpose. By giving full effect to the law of a foreign state when—and only when—such purposes or policies would be served or effectuated, the forum state does, as a practical matter, accord due 'deference and respect' to such foreign law . . .²⁴²

236. See *People v. One 1953 Ford Victoria*, 311 P.2d 480 (Cal. 1957); *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953).

237. 201 So. 2d 743 (Fla. 1967).

238. *Id.* at 744–45.

239. *Id.* at 747.

240. *Id.*

241. See *id.* at 747 (quoting RESTATEMENT (SECOND), *supra* note 144, § 379(1) (Tentative Draft No. 9, 1964)).

242. *Hopkins*, 201 So. 2d at 747.

He failed to see that the happenstance of a plane crash in Illinois gave that state any interest in the application of its law and concluded that Florida would refuse to apply the Illinois limitation on wrongful death damages.²⁴³

But on rehearing, the court reversed itself.²⁴⁴ A new majority of four plainly thought the Illinois wrongful death statute the only one applicable.²⁴⁵ It could find no basis in the rules of statutory interpretation for separating the damage limitation from the underlying right to sue and posed the issue squarely in terms of whether such a limitation was so repugnant to Florida's statutory policy of unlimited damages as to be unenforceable. With no discussion, it found that it was not.²⁴⁶ The New York Court of Appeals' controversial decision in *Kilberg v. Northeast Airlines, Inc.*,²⁴⁷ in which that court had done precisely what the court here was refusing to do, was sharply distinguished in a footnote as basing its contrary conclusion on a constitutional rather than a statutory prohibition of damage limitations.²⁴⁸ And, in the majority's view, any discussion of tort conflicts doctrine was inappropriate in a case "explicitly characterized" as a warranty proceeding.²⁴⁹

In its wooden and mechanical insistence on territorial principles, the final opinion in *Hopkins* is the typical one. Whatever policy the absence of damage limitations in Florida's wrongful death statute reflected, it was not strong enough to override the normally applicable territorial rule that wrongful death damages are a function of the law of the place of wrong.²⁵⁰ As a result, Florida's policy, and with it the claim of a Florida resident to the protection of that policy, was subordinated to that of another state. The bias so often apparent in these cases—the tendency of the forum to choose its own law, particularly when that law would allow an injured plaintiff to recover, and particularly when the plaintiff happens to be a forum resident²⁵¹—was entirely missing. No one reading the final opinion could accuse the court of result-oriented decision-making. With the abrupt reversal, Justice Roberts lost his bid to place Florida in the forefront of the choice-of-law revolution, which had erupted only five years earlier with the

243. *Id.* at 747–48.

244. *Id.* at 749.

245. *See id.* at 751.

246. *Id.*

247. 172 N.E.2d 526 (N.Y. 1961).

248. *Hopkins*, 201 So. 2d at 751 n.3.

249. *Id.* at 751.

250. *See, e.g.*, RESTATEMENT, *supra* note 74, § 417 (1934).

251. *See, e.g.*, Korn, *supra* note 6, at 780.

New York Court of Appeals' watershed decision in *Babcock v. Jackson*.²⁵² More significantly, it was the first and last time that the Supreme Court of Florida would speak in the language of interest analysis in a conflict-of-laws case.

Despite the importance claimed by Justice Roberts for the public policy exception in Florida's conflicts jurisprudence, it has never been invoked in a torts case; and in contracts cases it has been used only infrequently, especially in recent years.²⁵³ The most notable example is *Gillen v. United Services Automobile Ass'n*,²⁵⁴ decided in 1974, which involved an "other insurance" clause in an automobile insurance policy. The clause was valid in New Hampshire where the policy was issued and delivered and the Gillens were resident at the time, but invalid in Florida where, with notice to the insurer, they had permanently relocated and were living when Mr. Gillen was killed and Mrs. Gillen seriously injured in a collision caused solely by the negligence of an uninsured motorist.²⁵⁵ In an opinion by Justice Adkins, the court refused to give effect to the clause, declaring that public policy "requires this Court to assert Florida's paramount interest in protecting its own from inequitable insurance arrangements."²⁵⁶

Justice Adkins never said why the statutorily based public policy in this case was strongly held whereas that in *Hopkins* was not, illustrating once again the subjectivity inherent in the exception. The solicitude expressed for Florida's policies and its residents would be more striking were *Gillen* not such an isolated instance. The result should not obscure the fact that in most of its conflicts decisions the court has been content to apply the traditional territorial rules in mechanical fashion, letting the chips fall where they may.

The same kinds of considerations that underlie the public policy exception are present in the interest analysis provisions of section 6, but they have received remarkably short shrift in the cases which the court has decided since 1980 when it adopted the Second Restatement approach for

252. 191 N.E.2d 279 (N.Y. 1963).

253. See, e.g., *Gillen v. United Services Auto. Ass'n*, 300 So. 2d 3 (Fla. 1974); *Cerniglia v. C & D Farms, Inc.*, 203 So. 2d 1 (Fla. 1967); *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956); *Kellogg-Citizens Nat'l Bank v. Felton*, 199 So. 50 (Fla. 1940). Despite specific urging, the court refused to invoke the exception in *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166 (Fla. 1985); *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So. 2d 1059 (Fla. 1981); and *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981).

254. 300 So. 2d 3 (Fla. 1974).

255. *Id.* at 4-5.

256. *Id.* at 7.

torts cases in *Bishop v. Florida Specialty Paint Co.*²⁵⁷ In fact, it would be fair to say that the Restatement itself has received remarkably short shrift at the hands of the court.

Bishop itself was an easy case, a paradigm false conflict, which the court used only as a vehicle for abandoning its traditional adherence to *lex loci delicti* and adopting the approach of the Second Restatement instead. It seems safe to say that had the court reached the merits, it would have applied Florida law. Members of the Bishop family, all Florida residents, were guests aboard a small airplane leased and operated by Florida Specialty Paint, a Florida corporation. They were flying to North Carolina for a holiday weekend. The plane, piloted by the company's president, also a Florida resident, crashed en route in South Carolina, allegedly due to the pilot's negligence. The Bishops brought suit in Florida against the company and its president to recover for their injuries. An airplane guest statute was in effect in South Carolina that required guests to show intentional misconduct or recklessness on the part of their host in order to recover. Florida had no such statute and required only a showing of simple negligence.²⁵⁸

A quick section 6 analysis would have revealed that South Carolina had no interest in the application of its airplane guest statute, the purpose of which was the protection of hosts from suits by ungrateful guests and the elimination of collusive lawsuits.²⁵⁹ The intended beneficiaries of this policy were South Carolina residents and the insurance carriers who insured them, none of whom were present in the case. Florida, in contrast, was interested in the application of its law to further its policy of full compensation for negligently inflicted injuries. As Florida was the only interested state, its law should have been applied.²⁶⁰

Since *Bishop* there have been only three cases—*State Farm Mutual Automobile Insurance Co. v. Olsen*,²⁶¹ *Hertz Corp. v. Piccolo*,²⁶² and *Celotex Corp. v. Meehan*²⁶³—but they have a good deal to say about what the court values in a choice-of-law method. And because the torts and contracts provisions of the Restatement are so similar,²⁶⁴ these cases offer consider-

257. 389 So. 2d 999 (Fla. 1980).

258. *Id.* at 1000.

259. *Cf. Ramey v. Ramey*, 258 S.E.2d 883, 884-85 n.5 (S.C. 1979).

260. *See Southerland & Waxman, supra* note 1, at 486-89.

261. 406 So. 2d 1109 (Fla. 1981).

262. 453 So. 2d 12 (Fla. 1984).

263. 523 So. 2d 141 (Fla. 1988).

264. *See* RESTATEMENT (SECOND), *supra* note 144, § 188. *Compare id.* section 145 (stating "The General Principle" for torts cases). Section 145 provides:

able insight into the use to which the court might put the Restatement, were it to extend its approach to contracts cases.²⁶⁵

Olsen was decided in 1981 and arose out of a 1976 car accident in Illinois between an Illinois uninsured motorist and Johnnie Olsen, a Florida resident, who died from injuries sustained in the crash. Both drivers were negligent in some unspecified degree. At the time of the accident, Illinois was still a contributory negligence state; Florida had recently adopted pure comparative negligence. Under the uninsured motorist provisions of Olsen's insurance policy with State Farm, his widow was entitled to recover from the company the damages that she was "legally entitled to recover" from the Illinois uninsured motorist. Whether she could recover from that person turned in the court's view on whose law would govern if she actually brought such a suit.²⁶⁶

The court held that Illinois law controlled.²⁶⁷ It singled out and reinforced with italics the presumptive place-of-injury language of section 146²⁶⁸ and reiterated *Bishop's* cautionary injunction that the state of injury "would,

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. Section 145 is followed by a number of specific sections dealing with particular torts and important issues in tort. In most instances these rules call for application of the law of the state where injury occurred unless the principles of section 6 displace that law.

265. For a more detailed treatment of these three cases, see Southerland *supra* note 5, at 817–27, 847–63; Southerland & Waxman, *supra* note 1, at 497–512. The discussion in text is drawn largely from these sources.

266. *Olsen*, 406 So. 2d at 1110.

267. *Id.* at 1111.

268. *Id.* Section 146, entitled "Personal Injuries," provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. at 1111 (quoting RESTATEMENT (SECOND), *supra* note 144, § 146).

under most circumstances, be the decisive consideration in determining the applicable choice of law.”²⁶⁹ Illinois “certainly” had the most significant relationship to the occurrence since the accident happened there.²⁷⁰ So far as the “relevant policies” of section 6 were concerned, the court simply asserted, without discussion, that Illinois’ interest in protecting its resident uninsured motorist from a subrogation suit by State Farm was “paramount to the relevant policies of Florida as the forum state.”²⁷¹ It stressed throughout the section 6 values of “certainty, predictability and uniformity of result” and “ease in the determination and application of the law to be applied.”²⁷² Justice Adkins wrote the majority opinion, Justice Sundberg alone dissenting.

Olsen was far more complex than the court’s brief opinion made it seem. It was a case with which a Second Restatement court with a different set of values could have had a field day. It was first of all a case of true conflict. Both states were interested in the application of their laws because the policies of each would have been furthered by such application. Florida’s policy, moreover, was not just any policy; it was one that plainly was strongly held. When *Olsen* reached the Fifth District Court of Appeal, the inflexible rule of *lex loci delicti* was still the law in Florida. That court refused to apply the law of the place of injury, and instead invoked the public policy exception to find that application of the contributory negligence rule would offend Florida’s public policy favoring comparative negligence.²⁷³ In this the court relied on Justice Adkins’ majority opinion in *Hoffman v. Jones*,²⁷⁴ the 1973 case in which Florida discarded contributory negligence and adopted pure comparative negligence in its stead, roundly condemning the rule as “unjust,” “inequitable,” “harsh,” “wrong,” “primitive,” and no longer responsive to modern conditions.²⁷⁵ It also noted the subsequent legislative recognition of the new rule in the Uniform Contribution Among Tortfeasors Act of 1976.²⁷⁶ All of this, it said, clearly

269. *Olsen*, 406 So. 2d at 1111 (quoting *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)).

270. *Id.*

271. *Id.*

272. *Id.* (quoting *Bishop*, 389 So. 2d at 1001).

273. See *Olsen v. State Farm Mut. Auto. Ins. Co.*, 386 So. 2d 600, 601 (Fla. 5th Dist. Ct. App. 1980), *quashed by* 406 So. 2d 1109 (Fla. 1981).

274. 280 So. 2d 431 (Fla. 1973).

275. *Id.* at 436–37.

276. *Olsen*, 386 So. 2d at 601. See FLA. STAT. § 768.31(3)(a) (Supp. 1976).

implied “that the concept of contributory negligence as a bar to recovery is contrary to the public policy of this state.”²⁷⁷

Justice Adkins, the author not only of *Hoffman* but of *Gillen* too, passed over this point in silence. It is true of course that the public policy exception as such has no place in a Restatement analysis, but the considerations that underlie it necessarily come into play in the assessment of policies and interests called for by sections 6(2)(b) and (c), particularly for courts that believe that state interests can be “weighed” in some way and then compared. From this perspective, Florida’s relevant policy was strong, but Illinois’ was not. Contributory negligence was on its last leg in that state. Two months before the *Olsen* opinion appeared in slip-sheet form, the Illinois Supreme Court repudiated contributory negligence and adopted pure comparative negligence in its stead.²⁷⁸

Moreover, Florida’s interest in the application of its law to further its policy could likewise be characterized as strong. Mrs. Olsen was a Florida resident—a widow whose husband, also a Florida resident, had been tortuously killed by an uninsured motorist. The application of Illinois law would mean that she would recover nothing for her husband’s death under an insurance contract negotiated, issued, and paid for in the state of Florida, insuring a risk principally centered here, and under which, without dispute, she would have been able to recover had the accident occurred in Florida, or for that matter in any number of other states. In all likelihood, the Olsens purchased this coverage believing that it would protect them in the event of an accident with an uninsured motorist. It strains belief to suppose that State Farm ever told them that their right to recover might vary drastically depending on the happenstance of where such an accident might occur.

By comparison, Illinois’ interest in the application of its all but defunct contributory negligence rule was virtually nil, especially in light of the fact that the individual claiming its protection was driving without insurance, almost surely in violation of his state’s financial responsibility laws and very possibly in violation of other laws as well. Justice Adkins expressed concern for the rights of an Illinois resident subjected to a subrogation suit by State Farm to recover any claim it might pay. A moment’s thought makes clear that the individual could never have been subjected to personal liability even had Florida law been applied. Mrs. Olsen’s right to recover against State Farm turned on her hypothetical right to recover from the uninsured

277. *Olsen*, 386 So. 2d at 601.

278. *See* *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981). The Illinois Supreme Court liberally and approvingly cited *Hoffman*. *See id.* at 888, 890, 895–97.

motorist. Had she actually brought suit against that individual, the contributory negligence doctrine would have barred her claim in Illinois, and she could not have sued in Florida because there was no basis for obtaining personal jurisdiction over the Illinois motorist. Any attempt by State Farm to enforce its subrogation rights against the Illinois tortfeasor would have foundered on these considerations. As a practical matter, the only loser had Florida law been applied would have been State Farm.

These considerations make it easy to say that from almost any standpoint of comparison—weight, strength, or degree of enlightenment—Florida's interest in furthering its policy far outweighed that of Illinois and that Florida's interests were therefore "more deeply affected." *Olsen* was a case in which any court predisposed to "weighing" interests, to assessing the wisdom of underlying policies or the strength with which those policies are held, or to incorporating some or all of the familiar preferences for forum law, recovery, and local residents in the search for "justice" in some larger sense would have had no difficulty in rationalizing the application of Florida law with the Second Restatement.

Florida's law and its policies likewise took a back seat in *Hertz Corp. v. Piccolo*,²⁷⁹ decided in 1984. Frank Piccolo, a Florida resident, was injured in Louisiana when his car was struck by a truck that had been rented in Louisiana from the Hertz Corporation. Piccolo brought suit in Florida under the Louisiana direct-action statute directly against Hertz as the insurer of the truck to recover for his injuries. The alleged tortfeasor, a Tennessee resident named John Kiern, was not joined in the action. The trial court dismissed the complaint for failure to join an indispensable party, considering this a procedural matter governed by Florida rather than Louisiana law.²⁸⁰ The first district reversed, holding that the issue was substantive and that the Louisiana direct-action statute controlled.²⁸¹

The supreme court agreed and devoted most of the opinion to saying why. But it said first that even if the question of joinder was substantive, it would still be possible for Florida law to apply if Florida had a more "significant relationship" to the issue under the Second Restatement approach adopted in *Bishop*.²⁸² Which state, then, had the "most significant relationship?" The court made that complex choice-of-law determination in

279. 453 So. 2d 12 (Fla. 1984).

280. *Id.* at 13.

281. *Piccolo v. Hertz Corp.*, 421 So. 2d 535 (Fla. 1st Dist. Ct. App. 1982), *aff'd*, 453 So. 2d 12 (Fla. 1984).

282. *Piccolo*, 453 So. 2d at 14.

a single sentence: "clearly in the instant case Louisiana has a more significant relationship to the issue than Florida."²⁸³

This unsupported and painfully brief assertion all but obscured the profound conflict in underlying policies. Louisiana's direct-action statute in terms permitted any person injured in Louisiana, resident or nonresident, to sue the tortfeasor's insurance company directly.²⁸⁴ The real problem, never mentioned by the majority, was focused by Justice Shaw in his dissent.²⁸⁵ Section 627.7262 of the *Florida Statutes* provided in pertinent part that

[i]t shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person first obtain a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.²⁸⁶

The constitutionality of this statute had been upheld a few months earlier in *VanBibber v. Hartford Accident & Indemnity Insurance Co.*,²⁸⁷ ending, as Justice Shaw observed, "some fourteen years of effort by this Court and the legislature to resolve the issue of whether an injured party could concurrently sue both the insurer and the insured."²⁸⁸ The relevant policy of the statute, in other words, was about as forcefully hammered out, sharply focused, and strongly held as a policy can be. That policy prohibited precisely what the court allowed, the use of Florida courts for the maintenance of a direct action against an insurance company.

Piccolo, like *Olsen*, was a true conflict, but one in a different pattern.²⁸⁹ Louisiana was interested in the application of its direct-action statute to

283. *Id.*

284. See LA. REV. STAT. ANN. § 22:655 (West 1978). The statutory language is set out in the margin of the opinion, *Piccolo*, 453 So. 2d at 13 n.2. Compare *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954) ("Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them.").

285. *Piccolo*, 453 So. 2d at 16 (Shaw, J., dissenting).

286. FLA. STAT. § 627.7262 (1) (Supp. 1982).

287. 439 So. 2d 880 (Fla. 1983).

288. *Piccolo*, 453 So. 2d at 16.

289. If a state's law is enacted for the benefit or protection of its own residents, then it will be interested in the application of that law only when the party urging its application is such a resident. Cases arise in which the parties are from different states, and each claims the benefit of the other state's law. This, Currie said, was an "unprovided" case, because "[n]either state cares what happens." CURRIE, *supra* note 98, at 152. A classic example is *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), a case in which, as a result of an accident

further its policy of protecting all persons tortuously injured in Louisiana, even though Hertz, seen as a Louisiana resident, would be disadvantaged as a result. Florida was similarly interested in the application of section 627.7262 to prevent the use of its courts for the maintenance of a direct action against an insurer, even though such application would work to the disadvantage of a Florida resident.

After these two cases, one had to wonder whether any policy embodied in Florida law would ever be considered sufficiently strongly held or important enough to override the place of injury as the decisive factor, at least in a case of any difficulty. Indeed, for all the use made of it, it was hard to see why the court adopted the Second Restatement approach in the first place. The comments to section 6 counsel the forum to give consideration to the policies and purposes of its own law, saying that if they would be furthered by the law's application to out-of-state facts, "this is a weighty reason why such application should be made."²⁹⁰ They likewise direct the court to give the same consideration to the relevant policies of other concerned states.²⁹¹ Yet in neither case did the court do this, much less attempt the relative determination that one state's interests were more deeply affected than the other's. Instead, for the announced reasons of ease and simplicity in decision making and certainty, predictability, and uniformity of result, it simply followed the presumption of section 146, which is nothing more than *lex loci delicti* by another name.

Both *Olsen* and *Piccolo* were true conflicts, the kinds of cases which, in Currie's view, could not be resolved by any rational calculus. In light of the results, it was at least possible to suppose that the court had imaginatively hit

in Ontario, an Ontario plaintiff sued a New York defendant in New York claiming the benefit of New York's ordinary negligence standard, while the New York defendant sought the application of Ontario's stricter gross negligence standard. The purposes of neither state's law would have been furthered by its application. Critics have used the phenomenon of the "unprovided" case to argue that interest analysis, as a choice-of-law method, is fundamentally flawed. See, e.g., CRAMTON ET AL., *supra* note 28, at 173. See generally *id.* at 171-75.

Piccolo, however, was not an "unprovided" case since the policies of both Florida and Louisiana would have been furthered by the application of their laws. It is a good case with which to make the point that a state's interest in the application of its law is not necessarily tied to cases in which such application would benefit or protect its own residents. A statute or common law rule may be intended by its makers to work to the disadvantage of the individual residents of a state in order to further a public purpose of a different order. The only question that interest analysis asks is whether the policy underlying a law would be furthered by its application. See Sedler, *supra* note 87, at 624; see generally Bruce Posnak, *Choice of Law-Interest Analysis: They Still Don't Get it*, 40 WAYNE L. REV. 1121 (1994).

290. RESTATEMENT (SECOND), *supra* note 144, § 6(2) cmt. e.

291. *Id.* at cmt. f.

on the place of injury as an arbitrary solution for these difficult cases, primarily for reasons of certainty, predictability, uniformity of result, and simplification of the judicial task, but also as the most neutral and least biased way of making the choice-of-law determination. There would have been much to commend such an approach.²⁹² It avoids the subjectivity that always seems to infect the apples-and-oranges comparison of state interests, and it is deferential to the legitimate interests of other states, thus contributing to the maintenance of interstate order and harmony. Commentators and academicians are prone to discount the fact that courts are busy and overworked,²⁹³ and they often fail to appreciate the dilemmas that practicing lawyers face in mapping litigation strategy and trying to give their clients cost-effective advice. From this point of view, a simple and relatively inflexible rule can be preferable to some more complex, cumbersome, and less predictable approach.

Unfortunately, these considerable virtues were lost altogether in *Celotex Corp. v. Meehan*,²⁹⁴ decided in 1988. In that case, the court managed to transform the Restatement's "most significant relationship" approach into the "significant relationships test."²⁹⁵ According to Justice Overton's majority opinion, "[t]he criteria for determining whether significant relationships exist" are the four contacts of section 145(2):²⁹⁶ 1) the place of injury; 2) the place of the injury-causing conduct; 3) the domicile or residence of the parties; and 4) the place where their relationship, if any, is centered.²⁹⁷ This amounted to the adoption of a contact-counting method in its simplest possible form. After *Meehan*, presumably, one simply adds up the contacts of section 145(2) by state and applies the law of the state with the most. It would be a profound understatement to say that with this case the court left

292. See Southerland & Waxman, *supra* note 1, at 549–58; Southerland, *supra* note 5, at 815–17.

293. But see CURRIE, *supra* note 98, at 629 n.2.

294. 523 So. 2d 141 (Fla. 1988). The case consolidated for argument and decision three cases from the Third District Court of Appeal—*Meehan v. Celotex Corp.*, 466 So. 2d 1100 (Fla. 3d Dist. Ct. App. 1985) (revised panel opinion adopted on rehearing en banc); *Nance v. Johns-Manville Sales Corp.*, 466 So. 2d 1113 (Fla. 3d Dist. Ct. App. 1985); and *Colon v. Celotex Corp.*, 465 So. 2d 1332 (Fla. 3d Dist. Ct. App. 1985)—all of which involved the application of Florida's borrowing statute to claims arising out of asbestos-related injuries. *Meehan* was the principal case. For a discussion of the facts and disposition in *Nance* and *Colon*, see Southerland, *supra* note 5, at 851–52.

295. *Meehan*, 523 So. 2d at 144.

296. *Id.*

297. See RESTATEMENT (SECOND), *supra* note 144, § 145(2). See *supra* note 264 (providing full text of section 145).

conflicts resolution under the Second Restatement more muddled than it found it.

Meehan is a perfect illustration of all that is wrong with contact counting. The case involved the application of Florida's borrowing statute to a claim arising out of an asbestos-related injury. Charles Meehan was exposed to asbestos products while working at the Brooklyn Navy Yard in New York from 1942 to 1944. At the time, he was a New York domiciliary and continued to make his home there until 1969, when he moved permanently to Florida. He had been a Florida domiciliary for eight years when, in 1977, he was diagnosed as having asbestosis and mesothelioma, a rare form of lung cancer, both diseases caused by the inhalation of asbestos fibers. He died from these diseases in 1978.²⁹⁸

In 1979 his wife, Carmella Meehan, filed a wrongful death suit in Florida against the Celotex Corporation and a number of other defendants, all corporations engaged in the manufacture and sale of asbestos products.²⁹⁹ Her action was brought on theories of strict liability, failure to warn, breaches of implied warranty, and negligence.³⁰⁰ Celotex, a Delaware corporation, had at some point after 1944 acquired the successor corporation to the Philip Carey Corporation, which was the Ohio company that had actually manufactured the asbestos products to which Meehan was exposed. None of the asbestos products involved were manufactured in New York, nor did any of the corporate defendants have its principal place of business there.³⁰¹ Meehan's former employer was not named as a defendant.

Florida's borrowing statute, section 95.10, provides that a cause of action that arises in another state and is barred there by the statute of limitations cannot be maintained in Florida.³⁰² Where Meehan's cause of action arose was, therefore, the critical issue, and it was one on which the domestic rules of New York and Florida differed sharply. Under New York law, Meehan was injured when he was last exposed to asbestos during the period 1942 to 1944; his cause of action arose at that point, and any claim for damages resulting from this exposure was barred by the New York three-

298. *Meehan*, 523 So. 2d at 144.

299. *Id.*

300. See Southerland, *supra* note 5, at 852 n.327 (citation omitted).

301. *Meehan*, 523 So. 2d at 151 (Barkett, J., concurring in part and dissenting in part).

302. See FLA. STAT. § 95.10 (1979). In 1987, while *Meehan* was pending, the supreme court decided *Bates v. Cook, Inc.*, 509 So. 2d 1112 (Fla. 1987), in which it determined that the question of where a cause of action arose for borrowing statute purposes was substantive rather than procedural, and was to be resolved under the "significant relationships test" of the Second Restatement. *Id.* at 1114-15.

year statute of limitations by 1947, at the latest.³⁰³ The exposure rule, a distinctly minority view, was not the law in Florida. Florida considered that Meehan's cause of action arose when he knew or should have known that he had been injured.³⁰⁴ If that event occurred in Florida in 1977 as the plaintiff claimed, then the borrowing statute was inapplicable and the suit was timely. In short, the two states defined the concept of "injury" in different ways.

Applying the so-called "significant relationship criteria," the court found that New York clearly had "the significant relationship with Meehan."³⁰⁵

Meehan was a resident of New York at the time of his exposure; the employer was domiciled in New York; the entire asbestos exposure was at one place of employment in New York; and Meehan continued to reside in New York for twenty-five years after his exposure to asbestos. These circumstances establish that the place where the conduct causing the injury occurred, Meehan's domicile, and the domicile of Meehan's employer at the time of the conduct causing the injury were all in the state of New York. The only significant contact with Florida is that the injury manifested itself and was discovered in this state. We find these circumstances establish a significant relationship with New York and, consequently, under the law of New York at the time of the district court of appeal decision, section 95.10 barred the action in Florida.³⁰⁶

This was not the end, however. While *Meehan* was pending, the New York Legislature enacted a statute that revived any time-barred claim for personal injury caused by the latent effects of exposure to asbestos, whether previously dismissed or otherwise, provided the action was brought within the one-year period from July 1986 to July 1987.³⁰⁷ The majority briefly discussed the effect of this statute and concluded that Meehan's claim had been revived and could proceed in Florida, conditioned on the application of New York substantive law to other issues in the case.³⁰⁸

The court was straightforward enough in its adoption of a contact-counting method and in its identification of the contacts that were relevant

303. *Meehan*, 523 So. 2d at 145.

304. *Id.*

305. *Id.* at 146

306. *Id.* (citations omitted).

307. *Id.*

308. *Meehan*, 523 So. 2d at 146.

for this purpose—the four contacts of section 145(2).³⁰⁹ But the first problem with the majority's approach was that the addition was wrong. The court never dealt with the place where injury occurred because it never decided whether it was exposure or discovery that constituted Meehan's "injury." The fact that New York and Florida defined injury differently lay at the heart of the dispute, intertwined with the place of injury and with the ultimate issue, the question of which state, by virtue of "significant relationships," should determine where a cause of action based on the injury arose.³¹⁰ The court simply fudged the question, saying that "Meehan was a resident of New York at the time of his exposure," and that "injury manifested itself and was discovered in . . . [Florida]." ³¹¹ Presumably, the place-of-injury contact belonged to neither state.

As to the second contact, the court assumed without analysis or discussion that the place of injury-causing conduct was New York, apparently because Meehan was exposed to asbestos dust there.³¹² The wrongful conduct complained of, however, was not the fact of exposure. It was the manufacture and sale of products in an unreasonably dangerous condition with no warning of that fact.³¹³ Carmella Meehan chose to sue the manufacturers of these products in strict liability—Celotex in particular as the successor in interest to Philip Carey, an Ohio corporation whose asbestos products had been manufactured in Ohio, and from there sold and shipped to various states, among them New York. It is hard to see how this "significant relationship" could fall to New York.

The court's treatment of the third contact was equally superficial. So far as the facts in the opinion disclosed, none of the defendants were New York corporations or had principal places of business there.³¹⁴ Their products, manufactured elsewhere, found their way into New York and were used there, as in many other states. Celotex itself was a Delaware corporation, present and doing business in any number of states, including Florida. Since the Brooklyn Navy Yard, Meehan's former employer, was not a party to the action, it is hard to see how its domicile was significant. The court asserted that decisively significant relationships with New York existed

309. *Id.*

310. *Id.* at 145–46.

311. *Id.* at 146.

312. *Id.*

313. *See Meehan*, 523 So. 2d at 151 (Barkett, J., concurring in part and dissenting in part).

314. *Id.*

because Meehan was a resident of New York, was exposed to asbestos there, and continued to make New York his home for some time thereafter.³¹⁵ It failed to mention in this part of its analysis that he was, and had been for eight years, a resident of Florida when his illness was discovered, continued to make his home in Florida thereafter until his death, and was survived by his wife, plaintiff in the action, who was also a Florida resident. If New York domicile at the time of exposure was a significant relationship with New York, then surely Florida domicile at the time of discovery was an equally significant relationship with Florida.

The particular facts of the case gave little scope to the place where the relationship between the parties, if any, was centered. An Ohio corporation manufactured the injury-causing product in Ohio. By chance, Meehan was exposed to that product in New York, where he lived and worked at the time; by chance, he was living in Florida when it first became apparent that he had suffered injuries from this exposure. Meehan's widow brought suit in Florida against the defendant, Celotex, a Delaware corporation who had stepped into the shoes of the original manufacturer through a series of corporate acquisitions, and who was present and doing business in Florida. Whatever the "center" of a relationship between parties is, and the court's opinion contained no discussion of this abstraction, no obvious one existed here.³¹⁶

The facts thus provided little basis for the court's conclusion that the significant relationships added up to New York rather than Florida. The contacts were either split between the two states, belonged to neither, or were too diffuse to be of help. The chief flaw in the majority's arithmetic was in attempting to decide where Meehan's cause of action for injury arose without first deciding what constituted his injury. In fact, the case presented the rather rare situation in which the place of injury was not a given, but itself was the underlying issue in dispute.

The second problem with the court's approach was that it effectively read section 6 and its interest analysis provisions out of the Restatement. The Restatement never suggests counting the four contacts of section 145(2); it directs a court to take them into account in applying the principles of

315. *Id.* at 146.

316. In her dissenting opinion, Justice Barkett argued that "the plaintiff had been a Florida resident for eight years before the disease manifested. All of the witnesses and testimony on damages will be in Florida. Thus, on the damages issues, the relationship between the parties clearly is centered in Florida." *Id.* at 151 (Barkett, J., concurring in part and dissenting in part).

section 6. The court's utter failure to do this left it blind to the fact that it was dealing with a false conflict, one in which Florida was the only state interested in the application of its law. This point was sharply focused by Justice Barkett in her dissent:

Several of . . . [the section 6] criteria are applicable here. For example, Florida clearly has an interest in protecting its residents from the hazards of occupational disease and allowing resident victims a right of action in such cases, based not upon the time of exposure but upon the victim's reasonable discovery of the disease. In light of New York's recent legislation, New York has the identical interest and policy. In fact, the recent legislation indicates that New York now favors the plaintiff's right to sue in such actions over the defendant's right not to be subjected to such suits even where the incubation period of the disease is great. Thus, there is no countervailing policy consideration to . . . [Florida's] interest in allowing this action to proceed.³¹⁷

Justice Barkett also pointed out that there would be no conflict of policies even without New York's one-year revival statute.³¹⁸ No defendant was sufficiently connected with New York, either at the time of exposure or the time of suit, to claim the protection of its exposure rule. In light of this, Justice Barkett stated, "it is difficult to see what interest New York has in the action at all."³¹⁹

New York's exposure rule reflects a policy of "outlawing stale claims"³²⁰ in order to grant repose "to every person and industry who could be a potential defendant."³²¹ But the intended beneficiaries of this policy, as Currie might have said, are those defendants with whose welfare New York is legitimately concerned—namely, those who are residents or domiciliaries of New York, or possibly, with corporations, those having their principal places of business there. Since none of the corporate defendants had such a relationship with New York, application of its law would not have furthered that policy. Conversely, because Carmella Meehan was a Florida resident, as was her husband during the last nine years of his life, the compensatory policy reflected in Florida's rule delaying accrual of a cause of action until

317. *Id.*

318. *Meehan*, 523 So. 2d at 151.

319. *Id.*

320. *Schmidt v. Merchants Despatch Transp. Co.*, 200 N.E. 824, 827–28 (N.Y. 1936).

321. *Schwartz v. Heyden Newport Chemical Corp.*, 188 N.E.2d 142, 145 (N.Y. 1963).

discovery³²² would have been furthered by its application. Florida was the only interested state, and its law should have been applied.

The court's opinion in *Meehan* shows that despite its seeming arithmetical simplicity and certainty, contact-counting as a method can be highly subjective and unpredictable. Even an accurate and exacting count would have left the contacts split at best, with no obvious "center of gravity."³²³ And if the contacts are fairly evenly divided, what can arithmetic tell a court then? One danger at this point is that a court may yield to the temptation to ascribe more "weight" to some contacts than others, to multiply them, or invent new and possibly irrelevant ones in order to make the count seem more decisive, much as the court did, for example, with the domicile of Meehan's employer.³²⁴ That contact had no actual relevance since the employer was not a party; it was, in any case, only another way of saying that Meehan lived and worked in New York at the time of exposure.

More critically, the method adopted in *Meehan* is at complete variance with the plain text of the Restatement. Section 6 was never mentioned except as part of the quotation of section 145(2), and most certainly its principles were never applied. In reading section 6 and its interest analysis provisions out of the Restatement, the court left itself with no way of distinguishing the easy cases of false conflict from the harder ones in which the clash of underlying policies is real. It is a little stunning to realize that after *Meehan*, a paradigm false conflict like *Bishop* could conceivably be resolved by the application of South Carolina law since two of the four contacts, the place of injury and the place of injury-causing conduct, would fall immediately to South Carolina.³²⁵ Presumably the Restatement was adopted in the first place to avoid this sort of result. Almost all of the modern approaches, the Restatement prominently among them, make use of interest analysis to identify false conflicts, and almost all resolve such cases in the same way, by applying the law of the only interested state.³²⁶ Flexible and eclectic though the Restatement approach may be, it simply cannot be used to support the result reached in *Meehan*.³²⁷

322. See *Seaboard Air Line R.R. Co. v. C.D. Ford*, 92 So. 2d 160, 164 (Fla. 1956).

323. See *supra* note 211.

324. See *Meehan*, 523 So. 2d at 146.

325. Compare the comment of Chief Judge Schwartz in *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 299 n.8 (Fla. 3d Dist. Ct. App. 1983) (Schwartz, J., dissenting), that "*Bishop* did *not* hold that the *lex loci* might not be applied, upon proper analysis, in the case itself."

326. See sources cited *supra* note 204.

327. In fairness, this assertion requires qualification. Florida is not alone in indulging in what I consider to be a misuse of the Restatement's methodology. Many commentators have

These three cases, then, represent the sum total of the court's decision making with the Second Restatement to date. Even though the approach taken in *Meehan* differs radically from that of *Olsen* and *Piccolo*, the three cases nevertheless have important elements in common. Most striking, perhaps, is the fact that all end with the application of the law of some state other than Florida. There is no reason to believe that the Supreme Court of Florida is indifferent to the policies embodied in Florida's laws or thinks them unimportant. Yet it is clear that when these policies come into conflict with those of another state, it is Florida's that will yield. This pattern is evident in the whole of the court's conflicts jurisprudence, which literally bristles with references to comity, the principle by which the courts of one state give effect to the laws of another out of deference and respect.³²⁸ The court has rested much of its conflicts doctrine on comity and evidently takes seriously its role in "the fostering of amiable and respectful relations among individual states."³²⁹

A second striking feature in these cases, closely related to the first, is the court's marked unwillingness to employ the techniques of interest analysis. Section 6 and its interest analysis provisions are a major component of the Restatement approach. Yet in none of these cases did the court give serious consideration to the content of Florida's laws and the importance of the policies they reflect, much less the extent to which Florida might be interested in the application of its laws to further those policies. In like fashion, the court paid little attention to the relevant policies reflected in the competing laws of the other states involved or the degree to which they were interested in their application. Even had it wanted to, the court was obviously in no position to make the comparative judgment that the Restatement calls for, the determination of which state's interests are "most deeply affected."

Also apparent in these cases is the court's preference for a simple and easy approach, one likely to produce certain, predictable, and uniform results without much fuss or bother. This tendency can be seen in the cases that

identified the parallel between the "most significant relationship" concept and the contact-counting approach pioneered by the New York Court of Appeals in *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954). See, e.g., *Kay*, *supra* note 119, at 527-28. The courts of several states appear to treat the two as virtually the same. See *id.* at 557 & n.229, (citing as examples *Schwartz v. Schwartz*, 447 P.2d 254, 256-57 (Ariz. 1968); *Fuerste v. Bemis*, 156 N.W.2d 831, 833 (Iowa 1968); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891, 893-94 (Vt. 1968); *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 425 P.2d 623, 625 n.1 (Wash. 1967)).

328. See cases cited *supra* note 8.

329. *Gillen v. United Services Auto. Ass'n*, 300 So. 2d 3, 7 (Fla. 1974).

antedate the Restatement, and it is especially pronounced in *Olsen* and *Piccolo*. Even *Meehan*, unwise and misguided though I think it is, can be read as an attempt to simplify and streamline the Restatement's complex approach. Given the mess that some courts have made of conflicts cases, it is hard to fault this attitude, but neither should its implications be missed. The cases show that the court's primary emphasis in conflicts cases is on the choice-of-law decision itself, not the result it produces. In a purely domestic case, the court is as diligent as any in its search for substantive justice—in reaching a result, that is, that seems fair and just and that makes good socio-economic sense for the case as a whole. In a conflicts case, on the other hand, what the court seems to value most is a quick and uncomplicated way of choosing the governing law, leaving the chips to fall thereafter where they may.

This sort of decision making is not to everyone's taste. It is unspectacular and passive, perhaps excessively deferential to the interests of other states, and usually results in the suppression of the policies embodied in Florida's laws, and along with them, frequently, the fortunes of Florida residents claiming their protection. In all three cases the policies implicated in Florida's laws were ones that could have been fairly characterized under traditional theory as "strongly held," and in all three Florida was interested in the application of its laws to vindicate those policies. With a case like *Gillen* on the books and the open-ended, policy-oriented provisions of the Restatement at its disposal, it is a little hard to understand why none of this seemed to count with the court.

After *Olsen* and *Piccolo*, it was at least possible to ascribe to the court a principled basis for its decision making, the use of the place of injury as an arbitrary solution for cases of true conflict, primarily for reasons of simplicity, certainty, and convenience, it is true, but principled nonetheless. *Meehan* changed all that. There is no warrant in the Restatement for simply counting the contacts of section 145(2) and in the process reading the principles of section 6, the Restatement's most important single section, out of it altogether. In taking this approach in *Meehan*, the court cut itself off from interest analysis and now has no way of distinguishing easy cases like *Bishop*, in which the choice-of-law is clear, from hard ones like *Olsen*, in which it is more difficult. Certainty, predictability, and ease of decision making were lost as well. Contact counting can be messy, indecisive, uncertain, and subjective. *Meehan* proves that, if nothing else.

V. CONCLUSION

A great deal of experimentation in choice-of-law methodology has gone on around the country in this century, particularly in the last forty years. From near unanimity at the turn of the century, the states have arrived today, with the choice-of-law revolution, at a point of astonishing diversity. Some continue to use traditional territorial methods in all areas; others have adopted one of the modern approaches; others, like Florida, use a combination of the two; and still others use a blend or synthesis of modern approaches in what has aptly been called "judicial eclecticism."³³⁰ Across the states, the elusive goal of uniformity of result has become unattainable as a practical matter. Without knowing in what state a lawsuit will be brought, it is impossible to predict whose law will govern. For those who can afford it, forum shopping has become the order of the day.

The source of all the diversity, some might say confusion, is not hard to identify. With the steady erosion of territorial constraints, it has become increasingly evident that there is no widely shared agreement on what it is that a choice-of-law method is supposed to accomplish.³³¹ Everyone has an opinion, but there is still no consensus on the basic underlying question whether it is the method that should count or the results that it produces. About the most that any one court can do is to adopt an approach with which it is temperamentally comfortable and then adhere to it consistently. At least in that way there can be a measure of uniformity, predictability, and certainty within a single jurisdiction.

Today there are almost as many choice-of-law theories as there are scholars and commentators. Of the modern approaches, at least nine have found sufficient favor to be adopted as rules of decision by one or more of

330. See LEFLAR ET AL., *supra* note 60, at 281–82. The authors say that "[j]udicial decisions in choice-of-law cases in the 1980's are not as diverse as the variety of [modern] theories and approaches . . . might suggest. The majority of American courts are synthesizing most of the theories, bringing them by loose interpretation closer together. . . . The effect is that all the modern theories are being bundled together by the courts, to make up 'the new law' of choice of law." At a later point, the authors assert that "most of the modern decisions, regardless of exact language, are substantially consistent with each other. [Whatever] . . . the opinion language . . . the real reasons and the results are likely to be about the same." *Id.* at 304. This "coming together" assessment of current developments is not a universally applauded one. See, e.g., Reppy, *supra* note 204. For an invaluable survey of the approaches in use in courts around the country through 1989, see Kay, *supra* note 119.

331. See, e.g., CRAMTON ET AL., *supra* note 28, at 230–37.

the states.³³² The Second Restatement is the most popular of these, but it has also been the most criticized.³³³ In my view, it has suffered unfairly at the hands of its critics. It can hardly be faulted for reflecting the confusion and uncertainty of the choice-of-law revolution in its combination of open-ended, policy-oriented provisions and presumptive, jurisdiction-selecting rules. The thrust of the criticism seems to be that it is too “flabby and amorphous” to be of real help in the choice-of-law process.³³⁴ Yet the blueprint provided by the text and the accompanying comments is a good deal more precise than this criticism would suggest.

The comments to section 188(2) direct a court to relate the enumerated contacts to the interest analysis provisions of section 6.³³⁵ The purpose of this is to determine whether a state having one or more of these contacts with the parties or the transaction is interested in the application of its law.³³⁶ “Interest” in this sense means that the relevant policy of the law would be furthered were it applied. If so, this constitutes a “weighty reason” for applying it.³³⁷ It seems self-evident that this process also supplies content to the term “significant relationship,” which is not otherwise defined. Any state interested in the application of its law will have such a relationship. If there is only one such state, then it is the state of “most significant relationship.”

To this point, the Restatement’s method is clear. If there is fault, it is that at this point the Restatement fails to provide exact guidance for the resolution of cases in which both states are interested in the application of their laws—for true conflicts, in other words. Yet this is the Gordian knot that no court or commentator has thus far been able to cut in a satisfying or convincing way. It seems idle to criticize the Restatement for leaving a court to its own devices at this juncture. Everybody knows the game cannot end in a tie. To avoid the appearance of bias, or perhaps for reasons of ease, certainty, and predictability, some courts will want an arbitrary way of denominating the state of “most significant relationship”; others will prefer

332. See Kay, *supra* note 119, at 585. Professor Kay states that along with the “traditional vested rights” approach, “American courts follow, either singly or in combination, a ‘center of gravity,’ ‘governmental interest,’ ‘comparative impairment,’ ‘most significant relationship,’ ‘better law,’ ‘principles of preference,’ ‘functional,’ [or] ‘lex fori’ . . . approach to choice of law questions.” *Id.*

333. See, e.g., CRAMTON ET AL., *supra* note 28, at 132–33.

334. See CRAMTON ET AL., *supra* note 3, at 300.

335. RESTATEMENT (SECOND), *supra* note 144, § 188(2) cmt. e.

336. See *id.* § 188(1) cmt. b.

337. *Id.* § 6(2) cmt. e.

to debate degrees of significance as a way of rationalizing the conclusion that one state's relationship is more significant than another's. The Restatement seems to invite a relative judgment with its "most deeply affected" language,³³⁸ but it can support either approach.

In the final analysis, how these difficult cases ought to be resolved has to remain for each court a matter of individual attitude and outlook rather than methodology. Use of the Restatement approach in the manner described quickly and easily enables the untroubling cases of false conflict to be recognized and disposed of, leaving a court free to spend its time and energies in deciding how it wants to resolve the harder cases of true conflict with the other values of section 6 as a guide. Taken on its own terms, the Restatement provides as sound an approach as any to choice-of-law. The problems that have arisen in actual use are not so much with the Restatement as with the courts themselves.

Florida is a case in point. The supreme court adopted the Restatement approach for torts cases in 1980 and has used it in three cases since.³³⁹ In the first, the analysis was painfully superficial, in the second, nonexistent. Though each was a true conflict, *lex loci delicti* better explains the results than anything contained in the Restatement. In the third case, *Meehan*, the court transmuted the "most significant relationship" approach into one of counting "significant relationship criteria."³⁴⁰ In the process it read section 6 and its interest analysis provisions out of the Restatement and managed to end with New York law, even though the conflict was false and Florida was the only interested state.³⁴¹ This is Second Restatement decision-making in name only.

One can only wonder why the court adopted the Restatement in the first place. The court has barely mentioned section 6, the Restatement's single most important section, and in particular has made no use of its interest analysis provisions. This is hard to understand. Interest analysis represents the most profound advance in choice-of-law thinking in this century and is an integral part of most modern approaches.³⁴² It is not a novel idea, nor an

338. *See id.* cmt. f.

339. *Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988); *Hertz Corp. v. Piccolo*, 453 So. 2d 12 (Fla. 1984); *State Farms Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981).

340. *Meehan*, 523 So. 2d at 144-45.

341. *Id.*

342. *See* sources cited *supra* note 204.

overly complex one.³⁴³ Certainly lack of awareness cannot explain it; Justice Barkett employed the technique with telling effect in her dissent in *Meehan*³⁴⁴—an opinion, incidentally, which can stand as a textbook example of how the Restatement ought to be used.

It was presumably to avoid the sterile and indefensible results that *lex loci delicti* was wont to produce in false conflicts like *Bishop v. Florida Specialty Paint Co.*³⁴⁵ that prompted the court to make the change originally. One of the Restatement's great strengths is the emphasis it places on the relevant policies of the states whose laws conflict. The Restatement allows a court to distinguish false conflicts like *Bishop* and *Meehan* from true conflicts like *Olsen* and *Piccolo*, and it opens the road to serious thought about how the more difficult cases should be resolved. That strength was dissipated in *Meehan*, along with the simplicity, certainty, and predictability that the court has always seemed to favor in a choice-of-law method. *Meehan*'s effect was to confuse choice-of-law, not to simplify it or make it more rational. It seems clear that the court has yet to reach the stage of considering what approach to take to true conflict resolution, and it has now left itself with no way of recognizing one when it arises.

At the supreme court level, the adoption of the Restatement for torts cases has gained little while costing much,³⁴⁶ and that is reason enough in itself to oppose its extension to the area of contracts. It is obvious that the court is free to use the Restatement in any way it wishes. It is also obvious that what today's court or tomorrow's might do is at best a matter of conjecture. Still, it seems all too likely that the court would soon call the five contacts of section 188(2) the "significant relationship criteria" and use the sum of these as its basis for choice. Contact counting is not the approach of the Second Restatement: it ignores the relevant policies of the states whose

343. The enormous literature that has grown up around Currie's work, much of it critical, might suggest otherwise. See, e.g., CRAMTON ET AL., *supra* note 28, at 152 (listing some of the more important critiques and responses thereto). See generally *id.* at 152–206.

344. *Meehan*, 523 So. 2d at 151 (Barkett, J., concurring in part and dissenting in part).

345. 389 So. 2d 999 (Fla. 1980). See *Lescard v. Keel*, 211 So. 2d 868 (Fla. 2d Dist. Ct. App. 1968); *Messinger v. Tom*, 203 So. 2d 357 (Fla. 2d Dist. Ct. App. 1967).

346. The same cannot be said of the district courts of appeal. At this level, the effect of adopting the Second Restatement has been profound and decidedly salutary. Most of the cases decided by the district courts with the approach of the Second Restatement thus far have been false conflicts. These have been sensibly resolved under the new freedom conferred by *Bishop* in favor of the law of the only interested state, although with a somewhat uneven appreciation for the method of the Restatement generally and interest analysis in particular. See Southerland, *supra* note 5, at 803 nn.121 & 123; Finch, *supra* note 30, at 683–84.

laws conflict and their interests in furthering those policies.³⁴⁷ As a method, it is subjective. Contact counting allows a court to rationalize an intuitive sense of whose law should govern without the need to articulate, even to itself, the nature or source of the intuition. It is subjective also in that someone must decide what contacts are to be counted and whether some are weightier than others; it can tempt a court to the manipulation, multiplication, and invention of contacts. And finally, it is inexact and uncertain, with no clear answer for cases where the contacts are closely divided or the count is indecisive.³⁴⁸

From its general pattern of decision-making in conflicts cases, it also seems clear that the court feels no real need for a method as complex as the Restatement's. *Bishop* itself was something of a fluke; the opinion began life as a lone dissent by Justice England, and the court's use of the Restatement has been grudging since, as if it were still of two minds in the matter. The court has seldom shown any inclination to control the outcome of a case by manipulating the choice-of-law decision; it has never seemed concerned with results in this sense, only with a quick and easy way of making the determination, preferably one reflecting an over elaborate concern for the laws and policies of other states.³⁴⁹ The bias for forum law so often detect-

347. See WEINTRAUB, *supra* note 52, at 378-382.

348. See, e.g., CURRIE, *supra* note 98, at 726-39.

349. This is particularly true in the area of torts. In its application of the law of some state other than Florida, the court's record is almost unblemished. See Southerland, *supra* note 5, at 863 n.355 and accompanying text.

In contracts cases, on the other hand, the overall impression is rather one of randomness. There is no clear pattern in the decisions apart from the fact that they are rather faithfully rule oriented; the "chips fall where they may" cliché best describes the tone of the opinions and the results reached. In chronological order, the cases are: *Perry v. Lewis*, 6 Fla. 555 (1856) (forum law) (Florida law applied to permit Alabama plaintiff to recover from Florida defendant); *Walters & Walker v. Whitlock*, 9 Fla. 86 (1860) (place of making) (no conflict between South Carolina and Florida law); *Walling v. Christian & Craft Grocery Co.*, 27 So. 46 (Fla. 1899) (place of making) (Florida married woman cannot invoke emancipated status under Alabama law to validate contract made in Florida); *Brown v. Case*, 86 So. 684 (Fla. 1920) (forum law) (Florida five-year statute of limitations bars action to recover on promissory notes made and enforceable in New York from defendant who thereafter relocated to Florida and resided there for six years prior to institution of suit); *Lloyd v. Cooper Corp.*, 134 So. 562 (Fla. 1931) (public policy) (married woman's contract made in Ohio and valid there not enforceable in Florida); *Kellogg-Citizens Nat'l Bank v. Felton*, 199 So. 50 (Fla. 1940) (public policy) (refusing enforcement of Florida married woman's contract valid in Wisconsin where made and plaintiff resided, but invalid in Florida where she subsequently became domiciled); *Scott v. Scott*, 61 So. 2d 324 (Fla. 1952) (place of making) (enforcement in Florida of separation agreement valid in Pennsylvania, where not contrary to Florida public policy); *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956) (public policy) (clause in

able in the choice-of-law decisions of courts elsewhere³⁵⁰ has been notably lacking in Florida. Relevant policies and state interests are clearly not a

contract waiving execution on homestead property valid in Virginia where made denied enforcement in Florida on public policy grounds); *Ray-Hof Agencies, Inc. v. Petersen*, 123 So. 2d 251 (Fla. 1960) (place of making) (finding that place of making of employment contract was Georgia and not Florida, and denying workmen's compensation benefits to Florida resident injured outside of Florida); *Cerniglia v. C. & D. Farms, Inc.*, 203 So. 2d 1 (Fla. 1967) (per curiam) (public policy) (noncompetition agreement valid where made denied enforcement in Florida on public policy grounds); *Colhoun v. Greyhound Lines, Inc.*, 265 So. 2d 18 (Fla. 1972) (place of making) (contract of carriage for interstate transportation made in Florida, where ticket was purchased so that Florida contract statute of limitations applied in damages suit for breach of contract); *Wingold v. Horowitz*, 292 So. 2d 585 (Fla. 1974) (forum law) (applying Florida remedial law favoring Canadian resident suing Florida resident for breach of contract made in the Bahamas and expressly subject to Bahamian law); *Gillen v. United Services Auto. Ass'n*, 300 So. 2d 3 (Fla. 1974) (public policy) (denying effect to "other insurance" clause in policy issued in New Hampshire as contrary to Florida public policy); *Goodman v. Olsen*, 305 So. 2d 753 (Fla. 1975) (place of making) (usurious nature of lending agreement made in New York governed by New York and not Florida law in suit by New York lender against Florida borrower); *Government Employees Ins. Co. v. Grounds*, 332 So. 2d 13 (Fla. 1976) (place of performance) (clause prohibiting excess judgment recovery valid in Mississippi where contract was made held invalid in Florida where insured was sued and insurer was obligated to provide good-faith defense); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981) (party autonomy) (upholding choice-of-law clause in interstate loan contract made in Massachusetts, even though interest rate was usurious under Florida law); *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So. 2d 1059 (Fla. 1981) (party autonomy) (upholding choice-of-law clause in mortgage agreement valid in Louisiana where made, but usurious under Florida law); *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166 (Fla. 1985) (party autonomy) (contractual provision fixing shorter limitation period, valid in Michigan where contract entered into but void under Florida law, enforced in Florida lawsuit as not contrary to Florida public policy); *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988) (place of making) (applying New York law where insurance contract was entered into to prohibit interspousal suit in Florida to recover for negligently inflicted personal injury); and *Lumbermens Mut. Cas. Co. v. August*, 530 So. 2d 293 (Fla. 1988) (place of making) (applying Massachusetts statute of limitations in Florida lawsuit against insurer for uninsured motorist benefits arising out of accident in Florida).

350. See, e.g., LEFLAR ET AL., *supra* note 60, at 263. A good example of apparent bias in favor of forum law can be found in the New York Court of Appeals' well-known line of guest statute decisions in the 1960s. The majority notes in *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969), that Judge Breitel, in his dissenting opinion, went so far as to suggest that the court's choice-of-law method amounted to nothing more than "a rule which will always result in the application of New York law." *Id.* at 401. Criticizing the majority's indifference to the significance of the place of injury, he said: "What has happened of course, is that lip service is paid to the factor of place, and promptly ignored thereafter, if the forum prefers its own policy preconceptions and especially if it requires denial of recovery to a plaintiff in a tort case." *Id.* at 411 (Breitel, J., dissenting).

concern. For a court with these predilections, an approach as sophisticated as the Second Restatement's is largely redundant.

Extending it to contracts cases, moreover, has the potential for causing a great deal of unnecessary confusion and uncertainty at the level of the district courts of appeal, where most of the decision-making in conflicts cases goes on. Since 1980, the supreme court's sporadic and doctrinally inconsistent opinions have given these important appellate courts little in the way of guidance, and they have been left to find their way through the Restatement's labyrinth pretty much on their own. In contrast to the supreme court, the district courts have tended to approach conflicts cases as if they mattered, but the opinions reflect some striking variations in methodology with nothing like consensus emerging from the considerable number of cases decided at this level.³⁵¹ To the extent that there is a predominant approach, it is, unfortunately, that of counting contacts or "significant relationships"³⁵²—a method, as I have said, that finds little support in the Restatement and that is fraught with uncertainty, unpredictability, and subjectivity.

Decisions in this vein, in fact, are probably responsible for the approach taken by the supreme court in *Meehan*; and with that case now in place, it is almost certain that contracts cases would be dealt with in the same way, certainly by panels already inclined in that direction. In relatively few instances has there been much attempt to relate contacts to the policies underlying laws in conflict and thus little in the way of identification or discussion of the interests of concerned states in the application of their laws.³⁵³ In the district courts, as in the supreme court, reluctance to employ the interest analysis provisions of section 6 is the most striking methodological feature of decision making with the Second Restatement.³⁵⁴

The opinions of Chief Judge Schwartz of the third district are notable exceptions to this generalization,³⁵⁵ however, and Judge Baskin continues to utilize interest analysis in her opinions though expressly disclaiming its

351. See Finch, *supra* note 30, at 680–81; Southerland, *supra* note 5, at 827–28.

352. See Finch, *supra* note 30, at 687–90; Southerland, *supra* note 5, at 827–29, 839–42.

353. See Southerland, *supra* note 5, at 839 & n.261; Finch, *supra* note 30, at 690–703.

354. See Southerland, *supra* note 5, at 839 & n.261.

355. See *Adams v. Brannan*, 500 So. 2d 236 (Fla. 3d Dist. Ct. App. 1986); *Young v. Hertz Corp.*, 496 So. 2d 175 (Fla. 3d Dist. Ct. App. 1986) (Schwartz, C.J., concurring specially); *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 298 (Fla. 3d Dist. Ct. App. 1983) (Schwartz, C.J., dissenting opinion).

appropriateness to a Second Restatement analysis.³⁵⁶ As a court, the fifth District has made the most determined use of policy-oriented methodology in its decision making.³⁵⁷ In *Stallworth v. Hospitality Rentals, Inc.*,³⁵⁸ the first district rested the result there on a section 6 policy analysis that resembled a weighing of interests more than anything else.³⁵⁹ What this suggests, unfortunately, is that there are significant differences of opinion among the judges of the district courts as to how the Restatement ought to be used. These differences would undoubtedly carry over into the area of contracts with the result that decision making in that area would be far less certain and predictable than it is at present.

The confusion and uncertainty that have surrounded the use of the Second Restatement at all levels in Florida make for the strongest argument against extending its approach to the area of contracts. The Second Restatement was designed to accommodate a variety of outlooks on choice-of-law, but not all in one place and at the same time. The district courts would probably welcome the Restatement's greater flexibility and sensitivity and on the whole would probably make imaginative use of its protean possibilities. But without strong leadership from the supreme court—something that so far has been significantly lacking—its virtues could all too easily become liabilities in an area like contracts, where the need for certainty and predictability is so great.

Lex loci contractus, as Justice Kogan observed in *Sturiano*, is old but not yet outdated.³⁶⁰ It has been the rule in Florida for almost a hundred years and has fit well on the whole with the temperament and interest of Florida's courts. If nothing else, it has familiarity to commend it, ingrained not only in judicial thinking and that of the practicing bar, but, as much as any rule, understood and relied upon by those who enter into contracts. It hardly needs to be said that the area of contract is quintessentially one in which it is more important to have a certain and predictable approach rather than one

356. See *Valsecchi*, 435 So. 2d at 297; *Harris v. Berkowitz*, 432 So. 2d 613, 616 (Fla. 3d Dist. Ct. App. 1983).

357. See *Brown & Root, Inc. v. Ring Power Corp.*, 450 So. 2d 1245 (Fla. 5th Dist. Ct. App. 1984); *Andrews v. Continental Ins. Co.*, 444 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984); *Amica Mut. Ins. Co. v. Gifford*, 434 So. 2d 1015 (Fla. 5th Dist. Ct. App. 1983); cf. *Olsen v. State Farm Mut. Auto. Ins. Co.*, 386 So. 2d 600 (Fla. 5th Dist. Ct. App. 1980) (pre-RESTATEMENT (SECOND) opinion refusing to apply Louisiana law permitting thief to convey good title to innocent purchaser as contrary to Florida's public policy).

358. 515 So. 2d 413 (Fla. 1st Dist. Ct. App. 1987).

359. See Southerland, *supra* note 5, at 844-47.

360. See *Sturiano*, 523 So. 2d at 1129.

that can be manipulated on an ad hoc basis to produce the result that strikes a particular court on a particular day as most “just.”

Yet in marked contrast to its torts counterpart with its relentless mandate for the law of the place of injury, *lex loci contractus* has survived and continues to enjoy a significant measure of popularity today precisely because it has never been a rule just for the sake of having a rule; it actually bears a certain correspondence to the world of people and affairs of which it is a part. There is widely shared agreement as to what constitutes a “just” result in a contracts case. It is one that effectuates the intentions of the parties and protects their expectations. People ordinarily intend to make valid agreements, and it is still apt to be more true than not that they tend to gauge such matters by the law of the place where they act.³⁶¹ To find on a later day some court upholding and enforcing an agreement that was valid where it was made may be disappointing, yet not out of line with the parties’ original expectations. There is probably no such thing as a “good” or “bad” accident, but American society freely tolerates, even applauds, the idea of bad bargains. Without losers, after all, there can be no winners.

Moreover—and again in sharp contrast to the place-of-injury rule—there has always been some play in the joints of *lex loci contractus*. In *Government Employees Insurance Co. v. Grounds*,³⁶² for example, the court invoked the performance branch of the rule to uphold an excess judgment award against an insurance company which had breached its obligation to provide its insured a good faith defense. The company’s insured caused an accident in Florida and was sued there. Though liability was clear, the company refused to accept an offer to settle for the policy limits, and the case went to trial. The resulting judgment far exceeded the policy limits, and the insured sued his company to recover the excess. Florida law permitted such an action; the law of Mississippi, where the contract of insurance was made and entered into, did not.³⁶³ The court applied Florida law, holding that “the place of performance was Florida, where the cause of action against . . . [the insured] was maintained and was defended by . . . [the company].”³⁶⁴ *Wingold v. Horowitz*³⁶⁵ involved a real estate financing deal that was concluded in the Bahamas between a Florida resident and a resident of Canada, the contract being made in the Bahamas and expressly subject to

361. See, e.g., Laycock, *supra* note 29, at 318–20.

362. 332 So. 2d 13 (Fla. 1976).

363. *Id.* at 14.

364. *Id.* at 15.

365. 292 So. 2d 585 (Fla. 1974).

Bahamian law.³⁶⁶ When the Florida resident defaulted on his obligations and was sued in Florida, the supreme court invoked the forum law branch of the rule to give the Canadian partner the benefit of Florida's more favorable remedial law.³⁶⁷

Decisions like these have tended to be the exception rather than the rule in Florida, but they suggest that Justice Kogan may have overstressed the inflexibility of *lex loci contractus* a bit in his *Sturiano* opinion. There will no doubt be cases where the place of making is fortuitous and has little to do either with the parties or their transaction,³⁶⁸ but it is unlikely that this will also be true of the place of performance. *Lex loci contractus* offers enough choices to be useful, but not so many as to become unpredictable. And for the relatively rare case where the otherwise applicable law would produce an intolerable result, there is always the public policy exception to fall back on.³⁶⁹ The main flaw in using territorial connecting factors as a basis for choosing law is that this approach either ignores or at least tends to obscure the policies underlying laws in conflict and the interests of the concerned states in their application. But in its studied refusal to utilize the techniques of interest analysis, the Supreme Court of Florida, as well as most of the district courts of appeal, seems committed to this course already. As long as state interests are going to be ignored, they might as well be ignored in as simple and uncomplicated a way as possible.³⁷⁰

366. *Id.* at 585-86.

367. *Id.* at 586.

368. In contrast to the First Restatement, the Second Restatement takes the position that the place of contracting, standing alone,

is a relatively insignificant contact. . . . [I]ssues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. . . . By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract

RESTATEMENT (SECOND), *supra* note 144, § 188(2) cmt. e.

369. *See, e.g.,* Gillen v. United Services Auto. Ass'n, 300 So. 2d 3 (Fla. 1974).

370. Compare the remarks of the West Virginia Supreme Court in *Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986), a guest-statute case in which the court refused to abandon its long-standing adherence to the *lex loci delicti* rule. The court said: "Nevertheless, we remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand." *Id.* at 556. The

Despite its richness, the scholarship of the choice-of-law revolution has not succeeded in reconciling the conflicting demands of “justice” in cases with multistate implications.³⁷¹ Considerations of substantive justice—in a nutshell, the impulse to decide cases in ways that make good socio-economic sense³⁷²—continue to compete with the array of values associated with the need for rules and the attendant pressure to follow them.³⁷³ It is no denigration of contemporary scholarship to say that much of it seems to skirt the role that value judgments play in the process,³⁷⁴ perhaps in tacit recognition of the fact that the whole subject represents a wildly unpredictable variable that no theory can control for.

Yet long ago Holmes identified value judgments as the “very root and nerve of the whole proceeding,”³⁷⁵ cautioning that courts decide cases not so much by rules as by value judgments.³⁷⁶ These, like beauty, exist only in the eye of the beholder; they are statements not of what is but of what ought to be, and so are necessarily as subjective as the individual who holds them. Whether an open-ended approach that allows a court to concentrate on good socio-economic results is better than a set of hard and fast rules like those of the First Restatement that offer neutrality, ease, simplicity, certainty, and predictability is a question that can only be answered with a value judgment. So, too, for that matter, is the question whether a particular socio-economic result is “good” or “bad,” “just” or “unjust.” The reality is that almost any conceivable choice-of-law method can be manipulated to achieve the result

court invoked the public policy exception to refuse enforcement of the guest statutes of other states. *Id.*

371. See, e.g., LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* (1991); Kramer, *supra* note 87; Laycock, *supra* note 29; Sedler, *supra* note 106; Singer, *supra* note 29.

372. See Leflar, *supra* note 70, at 1588; see also LEFLAR ET AL., *supra* note 60, at 297–300.

373. See L. FULLER, *THE MORALITY OF LAW* 39 (1964). See, e.g., Hancock, *Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited*, 18 U. TORONTO L.J. 331 (1968). Compare Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981).

374. The writings of Professor Joseph Singer are a notable exception to this generalization. See Singer, *supra* note 29, at 74–127.

375. O.W. HOLMES, *COLLECTED LEGAL PAPERS* 181 (1920).

376. See *id.*; see also *THE COMMON LAW* 1 (1881). In his separate opinion in *Brooks v. Sturiano*, 497 So. 2d 976 (Fla. 4th Dist. Ct. App. 1986), Judge Hugh Glickstein made the following remark: “In less than eloquent fashion, this writer has often described our work as appellate judges to be, more often than not, a verbalizing of our individual value judgments, however relative and nonabsolute they may be.” *Id.* at 980 (Glickstein, J., concurring in part and dissenting in part).

that a court wants to reach. In the end, the method is less important than the use a court makes of it.

To make this point more concretely, I want to return to *Gillen v. United Services Automobile Ass'n*,³⁷⁷ a case in which the Supreme Court of Florida, in an opinion by Chief Justice Adkins, invoked the public policy exception to avoid giving effect to an "other insurance" clause in an automobile insurance policy that had originally been delivered not in Florida, but in New Hampshire.³⁷⁸ The Gillens were residents of New Hampshire when they separately insured their Karmann Ghia and Volkswagen bus with United Services. The two policies, issued for one year, both contained uninsured motorist coverage, and separate premiums were paid on each. Six months after the issuance of the policies, the Gillens relocated permanently to Florida. They notified United of the move. A month later they sold the bus and bought a Volkswagen Squareback. United canceled the policy covering the bus and issued a new policy on the Squareback. A month after that, while riding in the Squareback, they were involved in a collision with an uninsured motorist in which Mr. Gillen was killed and Mrs. Gillen seriously injured.³⁷⁹

United refused to pay the combined total amount of both policies, taking the position that the "other insurance" clause in the Karmann Ghia policy was applicable because other similar insurance was available³⁸⁰ under the policy on the Squareback. Mrs. Gillen and the personal representative of her husband's estate brought a declaratory judgment action against United seeking to recover under both policies. The trial court found that "other insurance" clauses were valid and enforceable in New Hampshire but void in Florida because contrary to its public policy.³⁸¹ Since the Gillens were Florida residents at the time of the accident and the cars were licensed and garaged in Florida, all with United's knowledge, the court held the clause invalid and awarded Mrs. Gillen and her husband's estate the combined total of the coverage under both policies.³⁸²

377. 300 So. 2d 3 (Fla. 1974).

378. *Id.* at 6-7.

379. *See* *United Services Auto. Ass'n v. Gillen*, 280 So. 2d 52, 53 (Fla. 4th Dist. Ct. App. 1973).

380. *See id.* at 53-54. The critical language in the policy provided that "if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance" *Id.* at 53 n.1.

381. *Id.* at 54.

382. *See id.*

The Fourth District Court of Appeal reversed, holding that the Karmann Ghia policy was governed by the law of New Hampshire where the policy was issued and the insureds were living at the time.³⁸³ “The rights and obligations of the respective parties under the contract, once entered into, should not vary or fluctuate from state to state depending upon fortuitous circumstances of where an accident might occur, or the arbitrary decision of where the insured might elect to thereafter reside.”³⁸⁴ The Florida statute in question, which the supreme court had earlier interpreted as invalidating “other insurance” clauses, in terms applied to policies delivered or issued for delivery in Florida.³⁸⁵ Hence the question confronting the supreme court when the case reached it on certiorari was whether underwriting considerations applicable to insurance contracts made in Florida could also be applied to contracts made elsewhere, at least in a case where the principal location of the risk had shifted to Florida during the policy term.

Lex loci contractus certainly gave an unequivocal answer: the contract was made in New Hampshire and was valid there, and recognition of that fact should follow everywhere. But Justice Adkins left no doubt what he thought “justice” required in the case. He conceded United’s point that Florida’s statute applied to policies delivered in Florida but rejected the *expressio unius* implication that a case like this one was thereby meant to be excluded.³⁸⁶ United specialized in insuring officers in the armed services, “a rather mobile group.”³⁸⁷ The fact that United had been notified of the Gillens’ move to Florida and had issued a new policy on the Squareback constituted knowledge on its part that the risks covered by the policies had been shifted to Florida. “Yet premiums were collected on both policies by United, who now says it is liable under only one. There is nothing in law or equity which should aid an insurance company in so one-sided an arrange-

383. *Gillen*, 280 So. 2d at 54.

384. *Id.*

385. *See Sellers v. United States Fidelity & Guaranty Co.*, 185 So. 2d 689, 692 (Fla. 1966). In construing section 627.0851 of the *Florida Statutes*, the court said that the statute

does not permit “other insurance” clauses in the policy which are contrary to the statutorily limited amounts of coverage. It is clear that the statute does not limit an insured only to one \$10,000 recovery under said coverage where his loss for bodily injury is greater than \$10,000 and he is the beneficiary of more than one policy issued under § 627.0851.

Id. at 692.

386. *See Gillen*, 300 So. 2d at 6.

387. *Id.* at 6.

ment.”³⁸⁸ The Gillens were in the process of becoming permanent residents of Florida. Comity, “in theory a beneficial exercise in interstate harmony,”³⁸⁹ was not a sufficient basis for ignoring their status as “proper subjects of this Court’s protection from injustice or injury.”³⁹⁰

In their effort to escape the mandate of *lex loci contractus*, the plaintiffs had urged the court to apply the “most significant relationship” test of section 188 of the Second Restatement. In light of the view he took of the case, Justice Adkins found it unnecessary to take that step; but he then proceeded to demonstrate how the Restatement approach would work and with what effect. Florida, he said, had a “significant relationship” to the case because the Gillens had become Florida residents and had given their insurer notice to that effect; their cars were now garaged in Florida, and the risk covered by the policy was centered there.³⁹¹ In contrast, “[t]he only relationship with New Hampshire was established during the making of the contract. Although the place of negotiation was New Hampshire, very little importance should be attached to this fact. The Gillens merely received a standard form insurance policy from . . . [United’s] main office in Texas which was completed and returned.”³⁹²

New Hampshire’s relevant policy was “grounded in general on freedom of contract principles . . . [and its main purpose] was to provide protection only up to the minimum statutory limits.”³⁹³ Florida’s statute had “no similarly restricted purpose and, in fact, has been interpreted . . . to implicitly forbid ‘other insurance’ clauses.”³⁹⁴ He then said that

[w]hile it is generally undesirable to unduly criticize the decisions of a sister state, it becomes necessary to evaluate one court’s position on an issue and the reasons behind it in order to accurately assess the respective states’ interests. Here, the substantial interest of Florida in protecting its citizens from the use of “other insurance” clauses rises to a level above New Hampshire’s interest in permitting them. Public policy requires this Court to assert Florida’s

388. *Id.*

389. *Id.*

390. *Id.*

391. *Gillen*, 300 So. 2d at 6–7.

392. *Id.* at 7.

393. *Id.*

394. *Id.*

paramount interest in protecting its own from inequitable insurance arrangements.³⁹⁵

He might just as well have said that Florida's interests were those "most deeply affected." It was really a Restatement opinion; the only difference was the substitution of "public policy" at the end for the conclusion that Florida was the state of "most significant relationship."³⁹⁶

395. *Id.*

396. It is obvious, of course, that Justice Adkins did not intend this portion of his opinion to represent a complete and authoritative exposition of the Second Restatement approach. If he had so intended, he would undoubtedly have made mention of section 193, the specific section dealing with contracts of casualty insurance, which calls for application of the law of the state "which the parties understood was to be the principal location of the insured risk during the term of the policy," subject to the usual qualification as to displacement under the principles of section 6. See RESTATEMENT (SECOND), *supra* note 144, § 193. At the time the policy was applied for and issued, the parties certainly understood that the principal location of the risk was New Hampshire. The comments raise the possibility that that location may change during the policy term:

There may also be occasions when following the issuance of the policy the principal location of the risk is shifted to some other state. In such a situation, this other state will have a natural interest in the insurance of the risk and it may be that its local law should be applied to determine at least some issues arising under the policy. In any event, application of the local law of the other state would hardly be unfair to the insurance company, at least with respect to some issues, if the company had reason to foresee when it issued the policy that there might be a shift to another state of the principal location of the risk.

Id. cmt. d. Citing two cases and an ALR annotation, the Reporter's Note following section 193 adds that "[a] shift in the principal location of the risk has been held not to affect the applicable law in the absence of a novation." *Id.* at 615. The *Gillen* case itself is the subject of a later ALR annotation which deals specifically with "other insurance" clauses and concludes in the usual way that the authorities are divided on the question. See Robert A. Brazener, Annotation, *Automobile Liability Policy: Choice of Law as to Validity of "Other Insurance" Clause of Uninsured Motorist Coverage*, 83 A.L.R.3d 321, 326 (1978).

None of this helps that much in assessing what effect a shift in the principal location of the risk should have on the validity of terms contained in the policy at the time of issuance and delivery. Dissenting in the court below, Judge Mager thought that the "grouping of contacts" test set forth in section 188 gave Florida a more significant relationship to the issue than New Hampshire. See *Gillen*, 280 So. 2d at 56-57 (Mager, J. dissenting). This illustrates once again what Professor Finch has aptly called the "inscrutable hold" that contact counting seems to have on many of Florida's courts in their reading of the Second Restatement. Finch, *supra* note 30, at 687. "The phenomenon of contact counting," he continues, "usually takes the form of a court's enumeration of the various facts that associate a dispute with particular states, together with a summary conclusion that one state has the most 'significant relationship'" to the issue. *Id.* Judge Mager's assessment of the contacts fits this description precisely:

Gillen was a true conflict, and the opinion is a graphic example of the kinds of subjectivity inherent in the Restatement approach when it is used as a device for weighing interests in that kind of case. Because the Gillens had become Florida domiciliaries, Justice Adkins plainly thought that Florida had a strong interest in extending to them the protection of its statutory policy prohibiting the use of "other insurance" clauses in insurance policies. This would follow, of course, only if one accepts his unsupported assertion that the legislature did not necessarily intend to limit the statute's application to policies delivered or issued for delivery in Florida.³⁹⁷ He was perhaps a trifle disingenuous, too, in minimizing New Hampshire's interest as he did, an interest which stemmed from that state's desire to protect the integrity of contracts entered into under its auspices and authority, here an insurance contract made in New Hampshire between New Hampshire residents and an insurer licensed to do business in the state and conditioned on New Hamp-

In the instant case, the accident occurred in Florida; at the time of the accident the domicile of the insured was in Florida; the location of the automobile was in Florida; and, logically, the place for the performance to have occurred was in Florida. However, the place of negotiation as well as the place of contracting was in New Hampshire. It would seem, under the "grouping of contacts" test, that the State of Florida had a more significant relationship with the dispute than the State of New Hampshire.

Gillen, 280 So. 2d at 52, 57 (Mager, J., dissenting). Actually the location of the subject matter of the contract and the Gillens' domicile were divided between the two states. Where the accident occurred, which Judge Mager seemed to equate with the place of performance, is essentially irrelevant to assessing the effect of a shift in the principal location of the risk at some point during the policy term. The accident might have occurred anywhere, either before the Gillens' move or after it. None of this gets to the core issue, which is whether the validity of the clause should be determined by the law of the state where the risk was principally located at the inception of the policy or by the law of the state to which it was relocated at a later point. By comparison, the approach sketched by Justice Adkins seems far superior. Compare CURRIE, *supra* note 98, at 138-40.

397. This point was obviously troubling to Justice Dekle, who concurred specially in the result and holding only on the ground

that the insureds . . . had, prior to the accident, become residents of Florida, the vehicles were garaged here and their insurer had been so notified, thereby placing the carrier upon notice of the application of our statute . . . [O]therwise . . . Florida's public policy against "other insurance" clauses would not extend to policies issued and *delivered* in another state, for the statute on which Florida's public policy in this regard is founded . . . is hinged upon the predicate expressed in the statute itself as to insurance "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state." Our Florida statute cannot be engrafted upon New Hampshire legislation which that sovereign has seen fit to provide for its citizens.

Gillen, 300 So. 2d at 7 (Dekle, J., specially concurring).

shire underwriting policies and requirements. Even though the Gillens had left New Hampshire, United was a continuing presence there and was entitled to invoke that interest in order to secure the benefit of its original bargain.

Certainly in terms of the “justified expectations of the parties,” the Second Restatement’s supreme criterion in matters of contract,³⁹⁸ United arguably had a stronger claim than the Gillens. If we indulge the unlikely assumption that they had read and understood their policies, then they would have expected to recover at most the limits of a single policy in any accident with an uninsured motorist. That expectation, certainly United’s also, could hardly have changed simply because they chose to move to Florida. And yet it is precisely here that the elusive and not-to-be-controlled-for element of “justice” enters the picture. Justice Adkins knew perfectly well that there had been no real bargaining between the parties over the terms and conditions of the policy and, at least on the Gillens’ part, probably even less understanding of its provisions. As he noted, they had “merely received a standard form insurance policy”³⁹⁹ from United which was dutifully completed and returned. Nor was it lost on him that United could reasonably have foreseen that the Gillens, part of “a rather mobile group”⁴⁰⁰ which the company specialized in serving, would relocate at some point during the policy term. They were diligent in notifying United of the move, and there was ample opportunity for the company to rewrite the policy to conform to Florida law and to adjust the premiums to reflect the change if it had wished to do so.

The opinion, by a man who in my opinion was one of the truly great judges to serve on the Supreme Court of Florida in this century,⁴⁰¹ is rich in its appreciation of the realities of life in a complex, technologically advanced society in thrall to the automobile⁴⁰² and utterly dependent on the insurance

398. See RESTATEMENT (SECOND), *supra* note 144, § 188(1) cmt. b.

399. *Gillen*, 300 So. 2d at 7.

400. *Id.* at 6.

401. See also *Dedication—The Honorable James C. Adkins, Jr.*, 46 FLA. L. REV. vi–xi (1994).

402. Part of the price of the car and the freedom it bestows to go where we please when we please is the death of approximately 50,000 persons a year. In the forty-year period from 1944 to 1984 alone, 1,787,600 persons lost their lives in automobile accidents at an approximate cost of almost two trillion dollars. See Southerland, *supra* note 5, at 788 n.27. I am aware of no study that has attempted to calculate what the automobile has cost this society in gross over its approximately 90-year history, but if the direct and long-term costs of nonfatal accidents were added in, the dollar figure would probably approach the incomprehensible. By

industry as the only available, if never quite adequate, offset against the catastrophic risks and hazards attendant on its use. Justice Adkins would certainly have been the last person to deny the importance of contract or the general societal interest in providing stability in contractual arrangements and protecting the integrity of bargains.⁴⁰³ But his strong-handed treatment of the competing claims of the parties in this case left no doubt where he thought the equities lay. He simply made a value judgment. And for that purpose, as his opinion amply demonstrated, one conflict-of-laws method was as good as another.

way of comparison, the 40-year death toll of 1,787,600 considerably exceeds the 1,177,936 persons killed in all of the major wars in which this nation has participated. *See id.*

403. *Cf. Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988). Unlike the Gillens, the Sturianos had not come to Florida with the intention of taking up permanent residence there; they were described as "lifelong residents of New York" who, for several years prior to their accident, had migrated to Florida to spend the winter months. *See id.* at 1129. Also important in the court's mind was the fact that they had given their insurer no notice of this practice. *See id.* at 1129. *See also id.* at 1131 (Grimes, J., concurring).

Qui Tam: Blowing the Whistle for Uncle Sam

Anna Mae Walsh Burke*

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* Principal of Anna Mae Walsh Burke, P.A., Fort Lauderdale, Florida. B.A., Manhattanville College, 1960; M.S., Fordham University, 1962; Ph.D., Nova University, 1965; Ed.S. 1978; J.D. 1987. Practices in the area of Commercial Litigation with emphasis on *qui tam* actions.

I. INTRODUCTION

Qui tam, or standing in the shoes of the king, is an old occupation but never before has it been so profitable. A *qui tam* suit is one brought by a person who prosecutes a suit for the king as well as for himself.¹

Federal *qui tam* suits are brought under the False Claims Act ("FCA"),² which provides penalties for one who knowingly presents a false claim to the government, and also offers incentives to whistleblowers who expose the false claims. In the ten years since the passage of the 1986 Amendments to the FCA, both the number of cases and the size of the awards have skyrocketed. Even the Internet responds with thousands of "hits" when search words such as "*qui tam*" and "whistleblower" are entered. The reason for the increasing interest in *qui tam* litigation becomes obvious with a quick calculation. Using the penalty of \$10,000 for each fraudulent act, one determines that 100 proven transgressions yields a penalty of \$1,000,000. In addition, treble damages are awarded except under certain conditions, stated in the statute, in which cooperation by the defendant reduces the penalties to only double the damages as well as reasonable costs and attorney fees.

At the end of 1995, the government reported the following information:³

Qui Tam filings by Fiscal Year:

FY 87	33 cases
FY 88	60 cases
FY 89	95 cases
FY 90	82 cases
FY 91	90 cases
FY 92	119 cases
FY 93	131 cases
FY 94	221 cases
FY 95	274 cases

Qui Tam Recoveries (approximately):

FY 88	\$2 million
FY 89	\$32 million

1. WILLIAM BLACKSTONE, COMMENTARIES III *160.

2. 31 U.S.C. §§ 3729-3733 (1994).

3. Arent Fox (visited Jan. 1, 1997) <<http://www.arentfox.com/features/quitam/quitam.stat.html>>.

FY 90	\$40 million
FY 91	\$36 million
FY 92	\$124 million
FY 93	\$193 million
FY 94	\$379 million
FY 95	\$243 million

Total fraud recovery from fiscal year 1987 through fiscal year 1995 totaled \$3,342,390,684,⁴ of which approximately one-third was from *qui tam* actions. The lure of *qui tam* actions appears to be irresistible.

II. BRIEF HISTORY OF *QUI TAM*

The concept of *qui tam* can be traced to at least the thirteenth century where the process allowed one to gain access to the royal courts.⁵ Although there were several laws dating back to 1790 in the United States authorizing suits by private informers who would share in a percentage of the government's recovery,⁶ the FCA first became a viable and profitable action under Abraham Lincoln.⁷ Rampant fraud was being committed against the government during the Civil War. In 1861, for example, Grant testified about the inoperable rifles he found when he took over command in Cairo, Illinois,⁸ and further testimony was given in the debates preceding the passing of the act regarding spoiled food and the fact that the same horses were sold over and over again to the government. This fraud increased both the cost of the war and the suffering of the Union soldiers, as well as seriously hampered the war effort. The government needed public help to stop these actions since many government officials were apparently involved in perpetrating the fraud.⁹ At that time, the damages assessed against the *qui tam* defendant were taxed at twice the damage suffered by the government

4. Arent Fox (visited Feb. 4, 1997) <<http://www.arentfox.com/features/quitam/quitam.stat.html>>.

5. BLACKSTONE, *supra* note 1, at *160.

6. *See, e.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102; Act of July 5, 1790, ch. 25, §1, 1 Stat. 129; Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131; 133, Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38.

7. 31 Act of March 2, 1863, ch. 67, 12 Stat. 696.

8. Phillips & Cohen (visited Sept. 20, 1996) <<http://www.whistleblowers.com>>.

9. *See* CONG. GLOBE, 37th Cong., 3d Sess. 952-58 (1863) (quoted in 67 NW. U. L. REV. 446, 453 n. 82).

plus a \$2,000 penalty per incident with the relator getting fifty percent of the recovery.¹⁰

Although fondly known as the Lincoln Law, the FCA remained fairly inactive until the 1930s and 1940s when individuals began to use information obtained from public records as the basis for *qui tam* actions. These parasitic suits did not bring new information to the government but relied on information the government already had as the basis for the recovery claimed by the relator. The high point of these actions, or low point depending on your point of view, was the case of *United States ex rel. Marcus v. Hess*¹¹ where the relator obtained all his information from the public record and alleged false claims presented by a contractor. Although the question of the relator's share in that case went to the Supreme Court, the law was clear that there was no restraint on the relator's source of information. Specifically, the relator was not required to be an original source of information, and Marcus got his statutory percentage of the recovery. Congress changed the law to eliminate these parasitic cases, but the amended statute had a chilling effect on further cases. The costs of pursuing discovery in *qui tam* cases was high, and few attorneys were willing to risk representation of a *qui tam* plaintiff under that form of the law. The Senate Report for the 1986 amendments restates the Senate version of the 1943 amendments "specifically provided that jurisdiction would be barred on *qui tam* suits based on information in the possession of the Government unless the relator was the original source of that information."¹² But inexplicably these terms failed to make the final version of the Amendment. Even though these restrictive terms were not in the 1943 act, courts interpreted the Act in the light of the Senate Report. In *United States ex rel. State of Wisconsin v. Dean*,¹³ the State of Wisconsin was denied the right to maintain its position as relator in a matter of Medicaid fraud because it had already told its tale to the United States government as part of its reporting process. In the mid-1980s, the country once more found itself facing rampant fraud and was in need of assistance from its citizenry so that it was necessary to amend the relevant statutes. Congress did not feel that *Dean* represented its true attitude toward *qui tam* suits.

10. 31 Act of March 2, 1863, ch. 67, 12 Stat. 696.

11. 317 U.S. 537 (1943).

12. S. REP. NO. 345, at 12, 99th Cong., 2d Sess. (1986). Inexplicably this clause was eliminated from the final 1943 amendments.

13. 729 F.2d 1100 (7th Cir. 1984).

In order to encourage *qui tam* suits, the 1986 amended statute allows persons who are the original source of the government's information to bring suit even though some of the information may have been available in the public record. If there has been previous public disclosure, anyone who is not an original source is proscribed from bringing suit and the case will be dismissed for lack of subject matter jurisdiction. As the court in *Wang ex rel. United States v. FMC Corp.*¹⁴ stated: "*Qui tam* suits are meant to encourage insiders privy to a fraud on the Government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot."¹⁵ The court goes on to state:

Anyone who helped to report the allegation to either the [G]overnment or the media would have "indirectly" helped to publicly disclose it. If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it.¹⁶

The Amendments of 1986¹⁷ provided more opportunity for the whistleblower to obtain a recovery and yet presented certain restrictions which provided the government some degree of protection from parasitic suits. The 1986 amendments were "aimed at correcting restrictive interpretations of the act's . . . *qui tam* . . . provisions."¹⁸ As the court later said in *United States ex rel. Dick v. Long Island Lighting Co.*,¹⁹ "[o]ne must have been a source to the entity that first publicly disclosed the information on which a suit is based."²⁰ As the court stated in *Wang*, "[t]he history of the False Claims Act and the legislative history of its most recent amendment make clear that *qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based."²¹

14. 975 F.2d 1412 (9th Cir. 1992).

15. *Id.* at 1419.

16. *Id.*

17. 31 U.S.C. §§ 3729-3733.

18. Act of October 27, 1986, Pub. L. No. 99-562, 1986 U.S.C.C.A.N. (100 Stat. 3153) 5266, 5269 (to be codified at 31 U.S.C. §§ 3729-3733).

19. 912 F.2d 13 (2d Cir. 1990).

20. *Id.* at 17.

21. *Wang*, 975 F.2d at 1418.

The 1994 Amendments excluded suits which relate to the Internal Revenue Code of 1986 replacing the reference in the 1986 Amendments to the Internal Revenue Code of 1954. An interesting discussion of the history of the early years of the FCA appears in a number of places,²² as well as on an increasing number of web sites.²³

III. THE STATUTES

The FCA is codified at 31 U.S.C. §§ 3729–3733.²⁴ Because of its nature in controlling discovery and investigation of the case, 31 U.S.C. § 3733 will not be included in this paper.

22. *Qui Tam Suits Under the Federal False Claims Act: Tool for the Private Litigant in Public Actions*, 67 NW. U. L. REV. 446 (1972); JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (1993) (updated 1995, 1997); JAMES B. HELMER, JR. ET AL., FALSE CLAIMS ACT (1994).

23. See, e.g., Taxpayers Against Fraud, The False Claims Act Legal Center (visited Feb. 2, 1997) <<http://www.taf.org>>; Whistleblowers' Web Site, About Phillips & Cohen (visited Sept. 2, 1997) <<http://www.whistleblowers.com>>.

24. These specific sections provide:

§ 3729 False Claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false and fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **KNOWING AND KNOWINGLY DEFINED.**—For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **CLAIM DEFINED.**—For purposes of this section, “claim” includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **EXEMPTION FROM DISCLOSURE.**—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **EXCLUSION.**—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730. Civil actions for false claims

(a) **RESPONSIBILITIES OF THE ATTORNEY GENERAL.**—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **ACTIONS BY PRIVATE PERSONS.**—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Govern-

ment may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.**—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

- (i) limiting the number of witnesses the person may call;
- (ii) limiting the length of the testimony of such witnesses;
- (iii) limiting the person's cross-examination of witnesses; or
- (iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to

the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief nec-

IV. THE FORM OF THE LITIGATION

Presently, *qui tam* actions may entitle whistleblowers to receive part of the damages and penalties awarded to the government by filing suit on

essary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands (The text of this section is not included in this paper).

31 U.S.C. §§ 3729–3733 (footnotes omitted).

behalf of the government²⁵ and may also receive damages and penalties for themselves if they have been damaged by the blowing of the whistle.²⁶ For the remainder of this paper, the *qui tam* plaintiff shall be designated as "he" although it is equally probable that the party be a female as a male. If the government chooses not to intervene, the litigation may be pursued directly by the whistleblower in which case he will get a larger percentage of the government damages.²⁷

The process of the suit is statutorily controlled.²⁸ The relator must first inform the government of the information he has obtained concerning the fraudulent actions of the defendant. He must be an "original source" of this information²⁹ if the information has already been placed in the public record.³⁰ The statute is very specific about what constitutes public disclosure.³¹ The concept of original source is the key factor in commencing a *qui tam* suit if enough of the information has been publicly disclosed. The issue of whether a government employee can bring a suit has also been litigated.

The relator files the suit under seal on behalf of the government and himself. The complaint remains under seal for a period of sixty days while the government investigates the case and determines whether it will intervene.³² The government may ask the court to extend this period of time, but it has to present a well-founded argument for this extension.³³ If the government decides not to intervene initially, it may only intervene at a later date upon the showing of good cause to the court.³⁴ If the government chooses to initially intervene, it will carry the case forward itself, "and shall not be bound by an act of the person bringing the action."³⁵ If the government intervenes, the relator will receive between 15% and 25% of the recovery as determined by statute.³⁶ If the government does not choose to intervene, the relator may continue the case on his own and receive between 25% and 30% of the recovery.³⁷ Pursuant to statute, the government is not

25. *Id.* § 3730(c)(3).

26. *Id.* § 3730(d)(1)-(2).

27. *Id.*

28. *Id.* §§ 3730, 3733.

29. 31 U.S.C. § 3730(e)(4)(A).

30. *Id.* § 3730(2) 4A, 4B.

31. *Id.* § 3730(d)(1).

32. *Id.* § 3730(b)(2).

33. *Id.* § 3730(b)(3).

34. 31 U.S.C. § 3730(c)(3).

35. *Id.* § 3730(c)(1).

36. *Id.* § 3730(d)(1).

37. *Id.* § 3730(d)(2).

responsible for the relator's costs of the suit whether or not it intervenes. The government also cannot simply step back into the case and intervene at any time and at its own choosing. If the government desires to intervene in the case at a later date, it must present a very compelling case to the court to permit such intervention.³⁸ Once the case is initiated, whether or not the government has intervened, the relator may not generally dismiss the case or enter into a settlement with the defendant without the government's agreement. However, the court may approve the settlement agreement or the dismissal if it is shown that the relator has carried out the case in good faith³⁹ and that the settlement is fair or the dismissal legally sufficient. In general, however, once the complaint is filed it may only be dismissed by the consent of the court and the attorney general.⁴⁰ In *United States v. Griswald*,⁴¹ the relator, called the prosecutor at the time, B.I. Dowell, objected when the government tried to accept a token amount of money and a piece of land in satisfaction of a much larger judgment.⁴² It was held that if a settlement is reached which is approved by the parties and the court, the government cannot accept a lesser settlement for the relator's share. The relator's share is vested when the judgment is entered.

In a recent case of first impression, the court in *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*,⁴³ considered the conditions upon which the relator was entitled to a hearing if the government moved to dismiss the suit whether or not the government had intervened. The court said that if the finding can be made that the government's decision to dismiss is rationally related to a legitimate governmental purpose and that dismissal is not arbitrary, fraudulent, or illegal, the inquiry is at an end.⁴⁴ The court then applied this standard to the facts of the case to determine if the government had presented a "facially satisfactory" basis for dismissal or whether Sequoia had shown a "substantial and particularized need" by "challenging the legitimacy of the asserted Governmental interest," or by "pointing to facts that indicated the claimed interest is pretextual," or "that dismissal is fraudulent," or if it appears that dismissal does not rationally

38. *Id.* § 3730 (c)(3).

39. 31 U.S.C. § 3730 (c)(2)(A)-(B).

40. *See, e.g., United States ex rel. Pedicone v. Mazak Corp.*, 807 F. Supp. 1350 (S.D. Ohio 1992).

41. 24 F. 361 (D. Or. 1885).

42. *Id.* at 366.

43. 912 F. Supp. 1325 (E.D. Cal. 1995).

44. *Id.* at 1338.

advance the asserted interest.⁴⁵ In the end, the court found that Sequoia had made a “colorable claim” and ordered a hearing at which the government would have to demonstrate a valid governmental interest. Then the relator would have to present evidence that dismissal is arbitrary, fraudulent, or illegal.⁴⁶

Along with the complaint, the relator provides the government with a disclosure document which is not filed and is maintained under seal. This disclosure document is generally kept from the defendant and may be considered to be work product. In the disclosure document, the relator presents all of the information he has so that the government can understand the nature of the claim. It is not necessary that the relator know “everything” about the evidence at this initial stage but enough information must be presented so that the government can carry out its own investigation. Mere allegations without some underlying evidence will not meet the pleading criteria. In *Mikes v. Strauss*⁴⁷ the court stated:

[T]he Court never expected plaintiff to be able to detail every aspect of defendants’ alleged fraudulent scheme prior to conducting any discovery. Instead, the primary concern of the Court was to prevent plaintiff from conducting a fishing expedition through the intricacies of defendants’ business in the hopes of uncovering some unlawful conduct on which to base the instant action.⁴⁸

As may be expected, *qui tam* cases are expensive and lengthy to litigate. If they survive motions to dismiss, summary judgment, and judgment on the pleadings, they may settle rather than be litigated.

V. JURISDICTION

The jurisdiction of the courts to hear a *qui tam* case is determined by statute.⁴⁹ Several states have passed their own *qui tam* legislation including California and Florida. The federal court has jurisdiction if state claims involve false claims which were perpetrated on the federal government. Since the defendant is often a corporation which transacts business in many locations, the relator often has the option of choosing a location convenient

45. *Id.* at 1346.

46. *Id.* at 1347.

47. 889 F. Supp. 746 (S.D.N.Y. 1995).

48. *Id.* at 751.

49. 31 U.S.C. § 3732.

for him or his attorney. Subject matter jurisdiction will be discussed under the topic "Relator".

VI. STATUTE OF LIMITATIONS

The statute of limitations is either six years from the date on which the violations of 31 U.S.C. § 3729 is committed, or

three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than ten years after the date on which the violation is committed, whichever occurs last as imposed by 31 U.S.C. § 3731(b)(1).⁵⁰

VII. CONSTITUTIONALITY

A standard defense posed by a number of defendants in *qui tam* actions is an attack on the constitutionality of the FCA. This defense has failed in a number of different courts but for different reasons.

A. Standing

The question of standing of the relator is but one aspect of the unconstitutionality argument. In a claim filed under 31 U.S.C. § 3729, it is the United States government which has suffered injury, not the relator, although the relator may have separate claims under section 3730(h). As the Court held in *Gladstone, Realtors v. Village of Bellwood*,⁵¹ to have standing under Article III of the Constitution, the plaintiff must show an actual or threatened injury that can be redressed by the judgment requested. In *Schlesinger v. Reservists Committee to Stop the War*,⁵² the Court found that the injury must be concrete.⁵³ If the government chooses to intervene, the question of standing is overcome but if the government does not choose to intervene then the standing of the relator is not so clear. There is a substantial body of case law which holds that individuals cannot bring an action against the executive branch without a showing of injury on the part of the

50. *Id.* § 3731(b).

51. 441 U.S. 91, 99–100 (1979).

52. 418 U.S. 208 (1974).

53. *Id.* at 209.

plaintiff.⁵⁴ As the Court stated in *Warth v. Seldin*,⁵⁵ unless the plaintiff has an “interest” because he suffered an injury, he might not pursue the litigation vigorously.⁵⁶ Faced with an impressive history of cases, the courts involved have sought to deny the motion to dismiss for lack of standing but for apparently conflicting reasons. The Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,⁵⁷ held that there was a historical basis for finding standing.⁵⁸ The court in *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*⁵⁹ found standing for the relator based on a history of courts finding standing for the relator.⁶⁰ Although this appears to be circular reasoning, it is apparent that the *Hughes* court wanted to find standing. In addition, *Hughes* found that the statutory bounty gave the relator a personal stake and thus created injury in fact.⁶¹ The court also recognized standing since the relator was usually an employee who had suffered possible termination or other job harassment because of the suit. The relator normally suffers personal injuries since the relator may lose his job or be prosecuted and therefore the action creates an injury in fact for the relator.⁶² Alternatively, the court in *United States ex rel. Burch v. Piqua Engineering*⁶³ did not find the historical basis postulated by the other courts, but did find there were potential ramifications to the employment status of the relators.⁶⁴ In *United States ex rel. Truong v. Northrop Corp.*,⁶⁵ the court dismissed the theories of the other two courts, stating that since most of the cases which formed the historical basis occurred before the modern theory of “standing,” the historical basis for standing was not viable. It also viewed any ramifications as to employment as “speculating harm.” It found the basis for standing lay in the injury to the United States government in whose

54. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. American United for Separation of Church and State*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

55. 422 U.S. 490 (1975).

56. *Id.* at 498–99.

57. 454 U.S. 464 (1982).

58. *Id.* at 488–89 n.24.

59. 714 F. Supp. 1084 (C.D. Cal. 1989).

60. *Id.* at 1096.

61. *Id.* at 1098.

62. *Id.* at 1099.

63. 803 F. Supp. 115 (S.D. Ohio 1992).

64. *Id.* at 119.

65. 728 F. Supp. 615 (C.D. Cal. 1989).

name the suit had been brought.⁶⁶ This was a simple and direct conclusion to a problem that had been troubling the courts.

A related issue is whether the claim is made against the United States if the false claim was actually made against a state which receives funding from the federal government for a particular project. The court in *United States v. Azzarelli Construction Co.*⁶⁷ held that since the federal highway program gave a set amount of money to the state and did not deal directly with contractors, unlike, for example, open-ended money disbursement programs such as Medicare, the federal government did not suffer any injuries from the alleged bid-rigging and a *qui tam* action could not be brought.⁶⁸ Responding to *Azzarelli*, Congress, in passing the 1986 Amendments, enacted 31 U.S.C. § 3729(c), which includes in the definition of a "claim" requests for funds made to a grantee or recipient of federal funds so long as the United States government has provided any of the money which is requested from the grantee. As the court in *Wilkins ex rel. United States v. Ohio*⁶⁹ noted, "[t]he definition makes no distinction between money provided as a fixed sum and money provided under an open-ended program, but rather is broad enough to include any request for money which was originally obtained from the United States government."⁷⁰ A relator, therefore, may have standing based on government's funding of state projects even though the false claims were submitted to the state rather than directly to the federal government.

B. Separation of Powers

The *Truong* court also addressed the issue of dismissal of the action based on Northrop's claim that the FCA violated the doctrine of separation of powers by unconstitutionally undermining the authority of the executive branch but the court rejected this claim.⁷¹ The court looked to the case of *Morrison v. Olson*⁷² which addressed a similar issue regarding a separation of powers challenge to the independent counsel provisions of the Ethics in Government Act of 1978.⁷³ That act created a "Special Division" of the

66. *Id.*

67. 647 F.2d 757 (7th Cir. 1981).

68. *Id.* at 761.

69. 885 F. Supp. 1055 (S.D. Ohio 1995).

70. *Id.* at 1062-63.

71. 728 F. Supp. at 620-21.

72. 487 U.S. 654 (1988), *remanded and aff'd*, 857 F.2d 801 (D.C. Cir. 1988).

73. *Id.* at 659.

Federal Court of Appeals for the District of Columbia which was empowered to appoint an independent counsel and define his prosecutorial jurisdiction.⁷⁴ Paralleling the *Morrison* Court's reasoning, the *Truong* court analyzed various phases of the litigation, more specifically Phase One: Initiating the Suit;⁷⁵ Phase Two: Conducting the Litigation;⁷⁶ and Phase Three: Terminating the Litigation,⁷⁷ and stated that:

In sum, the False Claims Act grants the executive branch greater litigative control than that provided for in the Ethics in Government Act of 1978, which the Supreme Court validated in *Morrison v. Olson*. Accordingly, defendant's constitutional challenge based on the separation of powers doctrine will not lie.⁷⁸

C. The Appointments Clause

In *Truong*, the defendant also raised a constitutional challenge based on a violation of the Appointments Clause, by allowing government litigation to be conducted by individuals who are not appointed in one of the ways enunciated in the Appointments Clause and thus are not "officers" of the United States.⁷⁹ The *Truong* court looked to distinguish the case in point from the holding of the Court in *Buckley v. Valeo*⁸⁰ which held that "[s]uch functions may be discharged only by persons who are 'Officers of the United States' within the language of [the Appointments Clause]."⁸¹ The *Truong* court agreed that the "relators" were not "officers" within the meaning of the Appointments Clause,⁸² further stating that "[t]hey enjoy limited powers, have no formal duties, hold no established office, have no prescribed tenure, and receive no federal emoluments. As such, they are more appropriately classified as 'agents' for Appointments Clause purposes."⁸³ The *Truong*

74. *Id.* at 661.

75. *Truong*, 728 F. Supp. at 621.

76. *Id.*

77. *Id.* at 622.

78. *Id.*

79. *Id.* at 622-23.

80. 424 U.S. 1 (1976).

81. *Id.* at 140 (alteration in original).

82. *Truong*, 728 F. Supp. at 623.

83. *Id.* See also *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (stating that the "position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an 'officer,' within the meaning of the clause of the [C]onstitution referred to.").

court distinguished the *Buckley* case on the basis that the *Buckley* court was concerned that Congress, through its appointments, was encroaching impermissibly on executive branch functions⁸⁴ and “[t]he Supreme Court . . . struck down what it regarded as congressional attempts to enlarge the legislative authority at the expense of that of the Executive Branch.”⁸⁵ But in a *qui tam* suit, the relator is a private person, in no way linked to Congress or the judicial branch.⁸⁶ The court pointed out that “[l]ower courts have, moreover, limited the potential reach of *Buckley*, finding the case inapplicable to private parties.”⁸⁷ The *Truong* court then found that “as long as private participation is not a subterfuge for Congressional control, the executive branch’s Article II responsibility to execute the laws faithfully is not threatened. Accordingly, defendant’s challenge based on the Appointments Clause cannot survive here.”⁸⁸

D. Double Jeopardy

The Fifth Amendment provides that “nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb.”⁸⁹ In a case under the FCA, a civil *qui tam* case is stayed pending the criminal trial of the defendant and, not only is the matter *res judicata* if the party is found guilty, but the defendant is also considered to have been found guilty for purposes of the civil trial if he has plead *nolo contendere*, and the civil trial proceeds only to determine damages.⁹⁰ The issue of double jeopardy arose in *United States v. Halper*.⁹¹ Halper had already been convicted and sentenced to two years imprisonment and fined \$5,000 for submitting sixty-five false claims for Medicare reimbursement. These claims had been submitted for \$12 rather than the correct \$3, resulting in a government loss of \$585. The government sought a penalty of \$2,000 per claim (the statutory penalty at that time) or \$130,000. The Supreme Court ruled in the face of such a large fine and small loss, that a defendant who had already been punished in a criminal case could only receive a second civil sanction if that could be

84. *Truong*, 728 F. Supp. at 623.

85. *Id.*

86. *Id.*

87. *Id.* at 623. See, e.g., *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 624 (D. Md. 1987); see also *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801, 816 (N.D. Ill. 1988).

88. *Truong*, 728 F. Supp. at 624.

89. U.S. CONST. amend. V.

90. *United States v. Nardone*, 782 F. Supp. 996 (M.D. Pa. 1990).

91. 490 U.S. 435 (1989).

characterized as remedial.⁹² The Court also presented standards to use in determining if that sanction was remedial, which included other costs experienced by the government.⁹³ The holding in *Halper*, however, applies only to a case in which the defendant has already been tried in a criminal case and received some punishment.

E. *Unjust and Unusual Punishment*

Another issue is the question of the amount of fines imposed by the statute which may be said to infringe on the defendant's constitutional rights under the Eighth Amendment. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁹⁴ This argument can only be made after the case has been tried, the damages suffered by the government determined, and the penalties assessed. This will have to be determined on a case-by-case basis. As stated above, the *Halper* case is only applicable when there has been a related criminal case.

VIII. THE RELATOR

The relator qualifies solely by being the provider of the information which forms the basis of the *qui tam* suit. It is the relator who brings the information to the government either prior to the suit or by the actual filing of the suit itself. If the information has been the subject of public disclosure and the relator is not the primary provider of information, the court will not have subject matter jurisdiction over the matter.

The FCA⁹⁵ provides that:

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.⁹⁶

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the infor-

92. *Id.* at 450–51.

93. *Id.* at 451.

94. U.S. CONST. amend. VIII.

95. 31 U.S.C. § 3730(e).

96. *Id.* § 3730(e)(4)(A) (emphasis added).

mation on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.⁹⁷

In *Wang ex rel. United States v. FMC Corp.*,⁹⁸ the court held that if there “has been no ‘public disclosure’ within the meaning of section 3730(e)(4)(A), there is no need for a *qui tam* plaintiff to show that he is the ‘original source’ of the information.”⁹⁹ As the court stated in *United States ex rel. Hagood v. Sonoma County Water Agency*,¹⁰⁰ the *qui tam* plaintiff need prove his status as an “original source” under section 3730(e)(4)(B) “only if an exception is sought to the bar of 4(A).”¹⁰¹

The *Stinson* cases are an example of different rulings coming down on basically the same set of facts. During discovery in an unrelated action, which was not a false claims case, *Stinson, Lyons, Gerlin & Bustamante, P.A.*, a law firm, became aware of alleged fraud being perpetrated by a number of insurance companies. The firm then filed a series of *qui tam* suits against a number of insurance companies with itself as the relator in each case. The question arose whether the information which was revealed by the defendant to the plaintiff during depositions in the discovery phase of the litigation had been “publically disclosed” so that the law firm was proscribed from bringing a *qui tam* suit based on it unless the firm could show that it was an original source. In *United States ex rel. Stinson v. Prudential Insurance Co.*,¹⁰² the court found that information revealed in a “hearing” or deposition taken in discovery was thereby placed into the public domain.¹⁰³ The court in *United States ex rel. Stinson v. Blue Cross Blue Shield of Georgia, Inc.*¹⁰⁴ found that information obtained in a deposition was not based on a public disclosure.¹⁰⁵ The two cases are an interesting compari-

97. *Id.* § 3730(e)(4)(B).

98. 975 F.2d 1412 (9th Cir. 1992).

99. *Id.* at 1416.

100. 929 F.2d 1416 (9th Cir. 1991), *aff'd*, 81 F.3d 1465 (9th Cir. 1996).

101. *See also* *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (11th Cir. 1991) (stating that “the district court in *Raytheon* determined that the government employee cannot qualify for the ‘original source’ exception to the jurisdictional bar of section 3730(e)(4)(A). The court here implied that because the government employee is required, as a condition of employment, to uncover and report fraud, two of the requirements for the ‘original source’ exception were not met . . .”).

102. 944 F.2d 1149 (3d Cir. 1991).

103. *Id.* at 1160.

104. 755 F. Supp. 1040 (S.D. Ga. 1990).

105. *Id.* at 1050.

son. In both cases there was the same relator and information obtained in approximately the same manner but a very different ruling. In *United States ex rel. Springfield Terminal Railway Co. v. Quinn*,¹⁰⁶ the court took a middle ground between the two previously cited *Stinson* cases, stating that the danger of parasitic suits is minimized when discovery is not filed and therefore is not put into the public record.¹⁰⁷ The court stated that *qui tam* actions are barred only when enough information exists in the public domain to expose the fraud transaction or the allegation of fraud.¹⁰⁸

The court in *United States ex rel. Neher v. NEC Corp.*¹⁰⁹ analyzed the case law relating to whether the *qui tam* action survives the death of the relator.¹¹⁰ The court quoting several cases¹¹¹ stated, and the parties agreed, that the survival of the action depended on whether it was remedial in nature or penal and that it could be remedial for one plaintiff and penal for another. It is clear that actions under the FCA are remedial to the government and that the death of the relator has no effect on the government's claim. The court went on to find, however, that

a *qui tam* relator suffers substantial harm and the *qui tam* provisions of the FCA are intended to remedy that harm. First, a *qui tam* relator can suffer severe emotional strain due to the discovery of his unwilling involvement in fraudulent activity. Moreover, the actual or potential ramifications on the relator's employment can be substantial . . . Finally, the relator can suffer substantial financial burdens as a result of the time and expense involved in bringing a *qui tam* action. We thus believe that the FCA's *qui tam* provisions are intended to redress wrongs suffered by individual relators such as Williams, rather than the general public.¹¹²

The court continued:

106. 14 F.3d 645 (D.C. Cir. 1994).

107. *Id.* at 657.

108. *Id.* at 647.

109. 11 F.3d 136 (11th Cir. 1993).

110. *Id.* at 137.

111. See, e.g., *Ex Parte Schreiber*, 110 U.S. 76, 80 (1884); *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 876 (11th Cir. 1986); *In re Wood*, 643 F.2d 188, 190-191 (5th Cir. 1980); *James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 729 (5th Cir. 1980); *Murphy v. Household Fin. Corp.*, 560 F.2d 206, 209 (6th Cir. 1977).

112. *Neher*, 11 F.3d at 138.

The recovery of a *qui tam* relator is intended to remedy the harm he suffered in several ways: by distancing the relator from the fraud and rewarding him for his involvement in the government's fight against unlawful activity; by compensating the relator for any harm he suffered with respect to his employment; and by compensating the relator for the substantial time and expense involved in bringing a *qui tam* action.¹¹³

The court went on to hold that "a relator's *qui tam* action survives his death."¹¹⁴

IX. DISCOVERY FROM THE GOVERNMENT

Although the relator is acting on behalf of the government, there are many barriers erected between the government and the relator if the government does not intervene in the case. For example, the relator might believe that obtaining documents from the government to prove the claim for the government would be simple, as the government certainly wants to have the claim proven so that it can get its share of the damages and penalties. It certainly might be considered to be the least the government can do since it did not intervene and all the costs of the action are being born by the relator. In fact, the relator and his attorney may find that obtaining documents from the government is more difficult than obtaining them from the defendants. For example, the government has a set of elaborate procedures known as Touhy regulations, which have been derived from *United States ex rel. Touhy v. Ragen*,¹¹⁵ by which the government will furnish information and grant access to government employees in connection with litigation. In many instances, it may be more difficult for the relator to obtain discovery materials from the government than from the defendant.

The relator does not have to provide the information to the government before filing his claim, although generally this is done. In such a case, the government has certain statutory protection if it has already been investigating the claim. The government has sixty days to intervene but it may get an extension if it has a good basis, which may be the continuation of its investigation. During this period, the complaint is under seal. The government may choose to intervene and carry out the case according to its own deci-

113. *Id.*

114. *Id.* at 139.

115. 340 U.S. 462 (1951).

sions. If the relator has not been an original source, in the event that there has been public disclosure, the relator will not be able to carry on the case because there will be an absence of subject matter jurisdiction. If the relator provides valuable information to the government as a direct and original source, he will then share in the recovery and penalties.

[T]he United States as against the defendants has the right to adopt as its own what was from the first claimed in its name, unprejudiced by any thing the relator may have done or omitted to do; but as respects the relator the United States must reward him out of the proceeds if he has really contributed original information in bringing the suit. It is when the United States fails to adopt or prosecute the suit, and the relator carries it on, that the defendants may raise an issue with the relator as to the merit of his activity in bringing it, and on this collateral issue may defeat it utterly.¹¹⁶

X. THE CLAIM

A. *What Constitutes a Claim?*

While the definition of "claim" lies within the statute itself¹¹⁷ and includes

any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded[.],¹¹⁸

there still has been considerable litigation regarding the nature of a claim. The elements of a claim under 31 U.S.C. § 3729 were outlined by the court in *Wilkins ex rel. United States v. Ohio*.¹¹⁹

116. *United States v. Pittman*, 151 F.2d 851, 853 (5th Cir. 1945).

117. 31 U.S.C. § 3729(c).

118. *Id.*

119. 885 F. Supp. 1055 (S.D. Ohio 1995).

[1] The elements of a claim under § 3729(a)(1) are: (1) that the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) that the claim was false or fraudulent; (3) that the defendant knew that the claim was false or fraudulent; and (4) that the United States suffered damages as a result.

[2] The elements of a claim under 3729(a)(2) are: (1) that the defendant made, used, or caused to be made or used, a record or statement to get a claim against the United States paid or approved; (2) the record or statement and the claims were false or fraudulent; (3) the defendant knew that the record or statement and the claim were false or fraudulent; and (4) the United States suffered damages as a result.

[3] The elements of a claim under § 3729(a)(3) are: (1) that the defendant knowingly conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States; (2) that one or more of the conspirators performed any act to effect the object of the conspiracy; and (3) that the United States suffered damages as a result of the false or fraudulent claim.

[4] A claim under § 3729(a)(7) requires proof: (1) that the defendant made, used, or caused to be used a record or statement to conceal, avoid, or decrease an obligation to the United States; (2) that the statement or record was false; (3) that the defendant knew that the statement or record was false; and (4) that the United States suffered damages as a result.

[5] The knowledge element of the above claims is defined in 31 U.S.C. § 3729(b). Under that section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

- (1) has actual knowledge of the information;
 - (2) acts in deliberate ignorance of the truth or falsity of the information; or
 - (3) acts in reckless disregard of the truth or falsity of the information,
- and no proof of specific intent to defraud is required.¹²⁰

These formulations are most useful in the preparation of a complaint.

120. *Wilkins*, 885 F. Supp. at 1059 (quoting *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1258–59 (S.D. Fla. 1989)).

B. *The Reverse Claim*

Among the 1986 amendments, Congress made provisions for what has been termed the "reverse" claim, in which the defendant allegedly has reduced a payment owed to the government through some fraudulent means, rather than submitting a fraudulent claim for payment to the government.¹²¹ This addition to the list of causes of action has greatly increased the range of *qui tam* cases filed since 1986.

In *Wilkins*, the court considered the situation in which the defendant omits certain information from records so as to reduce the payments owed to the government.¹²² The court concluded that for there to be a "reverse false claim," the government has to be made aware of the false statement, misrepresentation, or misleading omission in some fashion, *i.e.*, there has to be a "claim."¹²³

C. *False Claims or Fraud: The Element of Intent*

The amendment created by 31 U.S.C. § 3729(b) which removes the requirement of proof of intent to defraud has made the *qui tam* cases substantially easier to prosecute. The courts, however, have drawn a line with regard to the minimal degree of knowledge that the defendant must have had of the alleged fraudulent action.¹²⁴ Yet the courts are clear that

[m]ere negligence or innocent mistake is insufficient to satisfy the above standards for knowledge. Rather, defendant must act at least with "deliberate ignorance" or "reckless disregard" of the truth or falsity of the information.

Although plaintiff must prove that the defendant acted with knowledge as that term is defined in §3729(b), plaintiff is not required to prove that the defendant acted with the intent to deceive. The gist of the violation is not an intent to deceive but the knowing presentation of a claim, record or statement that is either "fraudulent" or "false" and the requisite intent is the knowing presentation of what is "known to be false" or "a lie."¹²⁵

121. 31 U.S.C. § 3729(7).

122. 885 F. Supp. at 1064.

123. *Id.*

124. *See, e.g.*, *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *Wilkins*, 885 F. Supp. at 1059.

125. *Wilkins*, 885 F. Supp. at 1059; *see also Wang*, 975 F. 2d at 1420; *Hagood*, 929 F.2d at 1421.

*United States ex rel. Stevens v. McGinnis, Inc.*¹²⁶ stands for the proposition that an omission of information from records which are required to be maintained may constitute a false statement or record under the FCA, but the defendant must have knowingly submitted the false claim. As the court stated in *Hagood*:

Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence. The statutory definition of “knowingly” requires at least “deliberate ignorance” or “reckless disregard.” To take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregarding.¹²⁷

Although one may believe that the essence of the *qui tam* action is fraud in fact, the legislature, in referencing a “false claim” rather than fraud, has effectively removed the requirement of proving intent.

D. Must Claims Under the FCA Be Plead with Specificity?

The standard for pleading fraud under the FCA is not Rule 9(b) of the *Federal Rules of Civil Procedure* but a substantially modified version of rule 9(b) based on exceptions which have been identified by several courts. *Durham v. Business Management Associates*¹²⁸ held that rule (9)(b) must be read consistently with rule 8 and, thus, must not abrogate the concept of notice pleading. As the court in *Colonial Penn Insurance v. Value Rent-A-Car, Inc.*¹²⁹ stated: “In *Durham*, the Eleventh Circuit stated that ‘[a]llegations of date, time or place satisfy the rule 9(b) requirement that the circumstances of the alleged fraud must be pleaded with particularity, *but alternative means are also available to satisfy the rule.*’”¹³⁰ “The Eleventh Circuit approves this alternative means”¹³¹ The purpose of requiring that fraud be plead with specificity under rule 9(b) is: 1) to put defendants on notice as to the conduct complained of so that they have sufficient information to formulate a defense; 2) to protect the defendants from

126. No. C-1-93-442, 1994 WL 799421, *4-8 (S.D. Ohio Oct. 26, 1994).

127. *Hagood*, 929 F.2d at 1421; *see also* *Mikes v. Strauss*, 889 F. Supp. 746, 751 (S.D. N.Y. 1995).

128. 847 F.2d 1505 (11th Cir. 1988).

129. 814 F. Supp. 1084 (S.D. Fla. 1992).

130. *Id.* at 1092 (quoting *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1512 (11th Cir. 1988)).

131. *Id.* at 1092.

frivolous suits; 3) to eliminate fraud actions in which all of the facts are learned through discovery after the complaint is filed; and 4) to protect a defendant from harm to its goodwill or reputation.¹³² The *Stinson* court has emphasized that these conditions can be met in other ways.¹³³ The FCA has other safeguards against multiplicity of suits. If there has been public disclosure, the relator must have “‘direct and independent knowledge,’ that is, be an ‘original source,’ of the allegations under section 3730(e)(4)(B)”¹³⁴ in order to apply the exception to rule 9(b).¹³⁵

The courts have found that the imposition of a strict enforcement of rule 9(b) would frustrate the purpose of the FCA, therefore courts allow an exception to the stringent rule so that the *qui tam* plaintiff can plead information which he knows exists but which may only be available to him now through discovery.¹³⁶ The requirement of pleading fraud with particularity under Rule 9(b) of the *Federal Rules of Civil Procedure* makes it difficult for many persons to bring a *qui tam* suit and frustrates the legislative intent of the statute.

Furthermore, pleadings cannot generally be based on information and belief unless the factual information is “peculiarly within the defendant’s knowledge or control.”¹³⁷ In such a case, allegations made on information and belief are acceptable if the complaint adduces “specific facts supporting a strong inference of fraud.”¹³⁸ Where, however, this factual information is peculiarly within the defendant’s knowledge or control, rule 9(b)’s requirement is relaxed somewhat.¹³⁹ “In such a case, pleading on information and belief is acceptable.”¹⁴⁰

The court in *United States v. Napco International, Inc.*¹⁴¹ followed the court in *Bennett v. Berg*¹⁴² which held that “[i]n determining the sufficiency of the pleading, the Court has considered ‘such matters as the time, place and contents of false representations, as well as the identity of the person making

132. *United States ex rel. Stinson v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1055, 1056–57 (S.D. Ga. 1990).

133. *Id.* at 1057.

134. *Cooper v. Blue Cross and Blue Shield of Fla.*, 19 F.3d 562, 567 (11th Cir. 1994).

135. *Id.* at 568.

136. *United States ex rel. La Valley v. First Nat’l Bank of Boston*, 707 F. Supp. 1351, 1355 (D. Mass. 1988).

137. *Stinson*, 755 F. Supp. at 1052.

138. *Id.*

139. *See, e.g., Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990).

140. *Stinson*, 755 F. Supp. at 1052.

141. 835 F. Supp. 493 (D. Minn. 1993).

142. 685 F.2d 1053 (8th Cir. 1982).

the misrepresentation and what was obtained or given up thereby.”¹⁴³ The Court in *Leisure Founders, Inc. v. CUC International, Inc.*¹⁴⁴ stated:

We are not persuaded by Defendants’ argument that the allegations of fraud fail to comport with the requirements of Fed. R. Civ. P. 9(b) because they fail to allege fraud with the requisite degree of particularity. Nor are we convinced that Rule 9(b) bars Plaintiff from pleading allegations based on “information or belief,” where the subject matter is “peculiarly within the adverse parties’ knowledge.”¹⁴⁵

Rule 9(b) requires that “the circumstances constituting fraud . . . shall be stated with particularity,” and is to be read together with rule 8.¹⁴⁶ A plaintiff must allege fraud with sufficient particularity to permit “the person charged with fraud . . . [to] have a reasonable opportunity to answer the complaint and adequate information to frame a response.”¹⁴⁷ The court in *Merrill Lynch v. Del Valle*¹⁴⁸ stated that the allegations must be accompanied by “some delineation of the underlying acts and transactions which are asserted to constitute fraud.”¹⁴⁹

However, pleading on “information and belief” must be done with great caution. As the court stated in *Stinson*,

[i]n the usual case, “[t]o pass muster under rule 9(b), the complaint must allege the time, place, speaker, and sometimes even the content of the alleged misrepresentation.” “Thus, pleadings generally cannot be based on information and belief.” Where, however, this factual information is peculiarly within the defendant’s knowledge or control, rule 9(b)’s requirement is relaxed somewhat. In such a case, pleading on information and belief is acceptable, but on one condition: the “complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed

143. *Napco*, 835 F. Supp. at 495 (quoting *Bennett*, 685 F.2d at 1062).

144. 833 F. Supp. 1562 (S.D. Fla. 1993).

145. *Id.* at 1574 (quoting *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972)). See also *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 666 F. Supp. 547, 559 (S.D.N.Y. 1987).

146. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 959 (D.C. Cir.1985).

147. *In re United States Oil and Gas Litig.*, No. 83-1702-A1-CIV., 1988 U.S. Dist. LEXIS 2217, at *4 (S.D. Fla. Feb. 8, 1988).

148. 528 F. Supp. 147 (S.D. Fla. 1981).

149. *Id.* at 149 (quoting *duPont v. Wyly*, 61 F.R.D. 615, 630 (D. Del. 1973)). See, e.g., *Leisure Founders*, 833 F. Supp. at 1574.

pleading standard.” (“[E]ven under a nonrestrictive application of the rule, pleaders must allege that the necessary information lies within the defendant’s control, and then allegations must be accompanied by a statement of facts upon which the allegations are based.”) Bald or otherwise conclusory allegations will not suffice. The “supporting facts on which the belief is founded must be set forth in the complaint.” And the complainant must be able to connect the allegations of fraud to the defendant.¹⁵⁰

In *United States ex rel. Robinson v. Northrop Corp.*,¹⁵¹ the court reaffirmed that “pleadings cannot generally be based on information and belief unless the factual information is ‘peculiarly within the defendant’s knowledge or control.’”¹⁵² In general, *qui tam* plaintiffs must meet the who, what, when, and where pleading requirement for fraud.¹⁵³

[I]t is not enough for plaintiffs to allege that “a Northrop engineer” or “Northrop employees” or “superiors” committed fraudulent acts. The identification of the employee, or at least a more specific description of the person, is within plaintiffs’ knowledge, and such information must be provided in the complaint.¹⁵⁴

Most of the allegations . . . repetitively refer to unnamed persons at unspecified times, even though the specifics are presumably known to the plaintiffs. Defendant complains that it has 35,000 employees and cannot reasonably respond in those circumstances. We agree.¹⁵⁵

The question of “when” is another matter which must be met. The court in *NCR Credit Corp. v. Reptron Electronics, Inc.*¹⁵⁶ dismissed a fraud complaint where the plaintiff made “mere conclusory” allegations, rather than alleging a specific date, time, name, or quoting specific misstatements.¹⁵⁷

In contrast, in *United States v. Napco International, Inc.*,¹⁵⁸ the government survived a motion to dismiss because it detailed each purchase

150. *Stinson*, 755 F. Supp. at 1052 (citations omitted).

151. 149 F.R.D. 142 (N.D. Ill. 1993).

152. *Id.* at 145 (citation omitted).

153. *Id.*

154. *Id.*

155. *Id.* at 146.

156. 155 F.R.D. 690 (M.D. Fla. 1994).

157. *Id.* at 693.

158. 835 F. Supp. 493 (D. Minn. 1993).

agreement, including the date of each invoice, the invoice number, the invoice amount, the country from which the materials were obtained, and the dollar amount spent on each procurement. This is possible when the government intervenes in the case, but rarely can the *qui tam* plaintiff offer such detail in the initial complaint, since he may have already left the employ of the *qui tam* defendant and is rarely able to take the required documents with him. They must, however, give reasonable delineation of the specifics of the false claims so that exact proof may be obtained through discovery. Discovery cannot be a complete fishing expedition, nor can the case be created in whole after the complaint is filed on the basis that the *qui tam* plaintiff has a "idea" that something may be occurring.

E. *Standard of Proof*

The standard of proof in a *qui tam* suit is by a preponderance of the evidence.¹⁵⁹ There are a number of "but for" *qui tam* cases in which the government (or the relator) must show by a preponderance of the evidence that the government would not have taken a certain action "but for" the false claim presented by the defendant. In *United States v. First National Bank of Cicero*,¹⁶⁰ the government had to show that it would not have guaranteed a Small Business Administration loan but for the actions of the defendants. The reliance of the government on the false claim must be shown if damages in addition to penalties are to be awarded.¹⁶¹

In *United States v. Farina*,¹⁶² it was determined that submitting a bid based on false information is not a violation of the FCA, although it may have been fraud.¹⁶³ It does become a violation, however, if the bidder wins the bid and tenders a bill or false claim to the government for the work.

The court in *Outlet Communications, Inc. v. King World Productions, Inc.*¹⁶⁴ also addressed this problem.

The court may consider only the pleadings, that is the complaint and answer, in deciding a Rule 12(c) motion for judgment on the pleadings. "[T]he fact allegations of the complaint are to be taken as true, but those of the answer are taken as true only where and to the extent that they have not been denied or do not conflict with

159. See, e.g., *Brooks v. United States*, 64 F.3d 251, 255 (7th Cir. 1995).

160. 957 F.2d 1362 (7th Cir. 1992).

161. See, e.g., *United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987).

162. 153 F. Supp. 819 (D.N.J. 1957).

163. *Id.* at 821-22.

164. 685 F. Supp. 1570 (M.D. Fla. 1988).

those of the complaint.” In order to prevail, a motion for judgment on the pleadings “must be based on the undisputed facts appearing in all the pleadings.”

Furthermore, the court is obliged to scrutinize the complaint, construed in plaintiff’s favor, and to allow it to stand “if plaintiff might recover under any state of facts which could be proved in support of the claim.”¹⁶⁵

“[T]he Court is confined to a review of the pleadings, must accept the pleaded facts as true, and must resolve any factual issues in a manner favorable to the non moving party.”¹⁶⁶ The *Colonial Penn* court went on to state that “a claim is subject to dismissal under Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”¹⁶⁷

The court in *Swerdloff v. Miami National Bank*¹⁶⁸ stated:

The posture of the case requires us to consider whether plaintiffs could prove *any* set of facts which would permit recovery under the Act. We make no suggestion as to whether such facts can be proven in this case. We merely hold that in our view of the law sufficient facts might possibly be shown under the cause of action here alleged to permit recovery and defendant was not entitled to judgment as a matter of law at the pleading stage of the proceeding.¹⁶⁹

The court in *Outlet Communications, Inc. v. King World Productions, Inc.* continued: “In essence, the court must examine the pleadings to determine whether any set of facts would permit plaintiff to recover as a matter of law.”¹⁷⁰

165. *Id.* at 1572 (citations omitted).

166. *Colonial Penn Ins. Co. v. Value Rent-A-Car, Inc.*, 814 F. Supp. 1084, 1090 (S.D. Fla. 1992). *See also* *Quinones v. Durkes*, 638 F. Supp. 856, 858 (S.D. Fla. 1986).

167. *Colonial Penn*, 814 F. Supp. at 1090.

168. 584 F.2d 54 (5th Cir. 1978).

169. *Id.* at 60.

170. *Outlet Communications*, 685 F. Supp. at 1572; *see also* *International Union of Dist. 50 v. Bowman Transp., Inc.*, 421 F.2d 934, 935 (5th Cir. 1970) (per curiam); *Security Life & Accident Ins. Co. v. United States*, 357 F.2d 145, 150 (5th Cir. 1966).

The Court held in *Conley v. Gibson*¹⁷¹ that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁷² The NCR court went on to say:

The ‘reasonable delineation of the underlying acts and transactions’ test should only be applied in those cases where due to the nature of the litigation, such as securities fraud, it is impossible for the litigant to have access to the detailed knowledge necessary to otherwise meet the requirement of Rule 9(b). In such case, the strict requirement of Rule 9(b) is relaxed so that substantial justice can be done.¹⁷³

The court in *Wilkins* repeats the statement of the Sixth Circuit, in *Michaels Building Co. v. Ameritrust Co., N.A.*,¹⁷⁴ that “the purpose undergirding the particularity requirement of Rule 9(b) is to provide a defendant fair notice of the substance of a plaintiff’s claim in order that the defendant may prepare a responsive pleading.”¹⁷⁵ The court in *Wilkins* evaluated the plaintiff’s position in determining that “[t]his is not a case in which a plaintiff completely unfamiliar with ODO or OCS had brought a *qui tam* action This gives greater weight to plaintiff’s representation that records and documents relevant to his claims will be found in the defendants’ possession.”¹⁷⁶ The court in *Wilkins* also found that because the plaintiff did not have equal access to the documents he sought, it was an appropriate case to apply the exception to rule 9(b).¹⁷⁷ “The purpose of harmonizing Rule 8 ‘notice pleading’ requiring only a ‘short and plain statement’ with the particularity requirement of Rule 9(b) is to allow that all pleadings be construed as to do ‘substantial justice’ as required under Rule 8(f).”¹⁷⁸

171. 355 U.S. 41 (1957). See also *Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055, 1058 (S.D. Ohio 1995); *NCR Credit Corp. v. Reptron Elecs., Inc.*, 155 F.R.D. 690, 692 (M.D. Fla. 1994).

172. *Id.* at 45–46.

173. *NCR Credit Corp.*, 155 F.R.D. at 692.

174. 848 F.2d 674 (6th Cir. 1988).

175. *Wilkins*, 885 F. Supp. at 1060.

176. *Id.* at 1061.

177. *Id.*

178. *NCR Credit Corp.*, 155 F.R.D. at 692.

If the defendant has been convicted in a criminal case on the same facts, it is collaterally estopped from contesting issues in the *qui tam* case, however, the government still has to prove damages.¹⁷⁹

F. Discovery

The Court in *Retail Clerks International Ass'n v. Schermerhorn*¹⁸⁰ found that "the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged."¹⁸¹ As the court in *Mikes v. Strauss*¹⁸² states: "The court never expected the plaintiff to be able to detail every aspect of defendants' alleged fraudulent scheme prior to conducting any discovery."¹⁸³ In *Wang ex rel. United States v. FMC Corp.*,¹⁸⁴ the court expected the plaintiff to conduct discovery to identify the evidence of the alleged fraud. The court in *United States ex rel. LeBlanc v. Raytheon Co.*¹⁸⁵ found that evidence publicly disclosed for the first time during the discovery phase of a *qui tam* suit is not barred from use in that same suit by section 3730(e)(4)(A). However, if it were barred, *qui tam* plaintiffs would have little choice but to waive their right to discovery for fear of disclosing information that would bar the claims for which they might wish discovery in the first place.

As previously discussed, there are several cases relating to the law firm of Stinson Lyons which discovered rampant cheating among insurance companies while it was conducting discovery against Provident Fire and Life Insurance Company. The law firm brought *qui tam* suits both against Prudential Insurance Co. and against Blue Cross Blue Shield of Georgia, but these courts had different holdings. In *United States ex rel. Stinson v. Blue Cross of Georgia*,¹⁸⁶ the court dismissed the complaint stating:

To prevail in this suit, Stinson Lyons necessarily would have to engage in massive discovery to begin to substantiate its allegations. It is precisely this conduct that Rule 9(b) is designed to pre-

179. See, e.g., *United States v. Nardone*, 782 F. Supp. 996 (M.D. Pa. 1990).

180. 373 U.S. 746 (1963), *aff'd*, 375 U.S. 96 (1963).

181. *Id.* at 753 n.6. See also *Wheeldin v. Wheeldin*, 373 U.S. 647, 648 (1963) (regarding inferring fact from allegations of complaint); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 723 (E.D. Cal. 1993).

182. 889 F. Supp. 746, 752 (S.D.N.Y. 1995).

183. *Id.* at 757.

184. 975 F.2d 1412 (9th Cir. 1992).

185. 913 F.2d 17 (1st Cir. 1990).

186. 755 F. Supp. 1040 (S.D. Ga. 1990).

vent There is nothing in the complaint that suggests that *all* of the facts needed to support this sanction do not need to be produced in discovery In short, Stinson Lyons still has alleged no facts that support an inference that BC-GA defrauded anybody.¹⁸⁷

G. Conspiracy

While 31 U.S.C. § 3729(a)(3) provides for a false claims action based on conspiracy, this has rarely been plead successfully. In part, this is based on the fact that most defendants are corporations rather than individuals. A corporation cannot conspire with itself, its agents, or employees.¹⁸⁸

XI. RETALIATION

A claim under section 3730(h) requires proof that: 1) the plaintiff engaged in lawful protected activity in furtherance of a FCA action; 2) the plaintiff is an original source; and 3) the plaintiff suffered the harm described in the statute because of these actions.¹⁸⁹

The “whistleblower” provision of the FCA prevents the harassment, retaliation, or threatening of employees who assist in or bring *qui tam* actions. In particular, the statute provides:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by is or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.¹⁹⁰

187. *Id.* at 1057.

188. *See, e.g.,* Leisure Founders, Inc. v. CUC Int’l Inc., 833 F. Supp. 1562, 1575 (S.D. Fla. 1993); Colonial Penn Ins. Co. v. Value Rent-A-Car, Inc., 814 F. Supp. 1084, 1096 (S.D. Fla. 1992); Baker v. McDonald’s Corp., 686 F. Supp. 1474 (S.D. Fla. 1987), *aff’d*, 865 F.2d 1272 (11th Cir. 1988).

189. 31 U.S.C. § 3730.

190. *Id.*

Several district courts have held that section 3730(h) protects internal whistleblowers.¹⁹¹ "To sustain an action under section 3730(h), plaintiff must prove that: 1) she engaged in conduct protected under the statute; 2) defendants were aware of her conduct; and 3) she was terminated in retaliation for her conduct."¹⁹² One element of protected conduct is "investigation."¹⁹³ As the court indicated in *Robertson v. Bell Helicopter Textron, Inc.*,¹⁹⁴ the *qui tam* plaintiff's conduct must be conduct protected under the statute, such as investigating alleged fraud in an effort to bring or help the government to bring an action under the FCA. The *Robertson* court relied in part on the legislative history of the act stating, "[t]he legislative history makes clear that a 'whistleblower must show the employer had knowledge the employee engaged in protected activity.'"¹⁹⁵

The court in *Neal v. Honeywell, Inc.*¹⁹⁶ explained that the actual filing of a *qui tam* suit should not be a prerequisite to protection, and stated that "we hold that the whistleblower protection provision of the False Claims Act forbids discrimination against an employee who has made an intracorporate complaint about fraud against the Government."¹⁹⁷ Indeed, in *Pogue v. United States Department of Labor*,¹⁹⁸ the court held that the internal whistleblower was protected even if no lawsuit was ever filed by the government or by another *qui tam* informant.¹⁹⁹ In *Aiello*, the court held that "[t]he *qui tam* statute prohibits 'any . . . manner [of] discrimination.'"²⁰⁰

191. See, e.g., *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995); *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 269 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 723 (E.D. Cal. 1993).

192. *Mikes v. Strauss*, 889 F. Supp. 746, 752 (S.D.N.Y. 1995). See also *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994).

193. 31 U.S.C. § 3730(h).

194. 32 F.3d at 951.

195. S. Rep. No. 345 at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300. See *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994) (restating Senate Report No. 345).

196. 826 F. Supp. 266 (N.D. Ill. 1993).

197. *Id.* at 273. See *Aiello*, 836 F. Supp. at 724 (discussing *Neal v. Honeywell, Inc.*, 826 F. Supp. 266 (N.C. Ill. 1993)). See also *Mikes v. Strauss*, 889 F. Supp. 746 (S.D.N.Y. 1995); *Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055 (S.D. Ohio 1995).

198. 940 F.2d 1287 (9th Cir. 1991).

199. *Id.* at 1290.

200. *Aiello*, 836 F. Supp. at 726 (citation omitted) (emphasis added).

The court in *Aiello*²⁰¹ also found that the relator was protected even if the relator was terminated by a later employer because of the influence of the *qui tam* defendant on the terminating employer.

The right of a government employee to be a relator has been challenged in a number of cases. In *Wilkins*,²⁰² the defendant claimed that the plaintiff was acting on behalf of the state because he was required by his job to investigate irregularities in the use of federal funds.²⁰³ The *Wilkins* court found that “[a]n employee can be acting on his own behalf in investigating matters in furtherance of a *qui tam* action even though he or she would also be conducting those same investigations on behalf of the employer.”²⁰⁴ The court notes “that section 3730(h) applies to employees who engage in lawful acts on behalf of the employee or others.”²⁰⁵ In *United States ex rel. LeBlanc v. Raytheon Co.*,²⁰⁶ the court found that a government employee could bring an action under the FCA based upon information obtained while acting as an employee. But *Raytheon* also held that a government employee could not qualify as an original source.²⁰⁷ The Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*²⁰⁸ rejected the holding of the First Circuit in *Raytheon* stating that the court improperly relied on an “original source” consideration where there had been no public disclosure.²⁰⁹ The *Raytheon* court also made a number of public policy arguments against the employee getting a share of the recovery when he was paid to work for the government²¹⁰ which were rejected by both the *Williams*²¹¹ and *Wilkins* courts.²¹²

The *Williams* court dismissed the dubious logic of the concept that a government employee held a dual status, so by telling himself the information, he was, in fact, publicly disclosing it.²¹³ That court also pointed out that the statute in section 3730(e)(4)(A) enumerates the circumstances in which information is considered to be publicly disclosed. The statute is very

201. *Id.* at 724–25.

202. 885 F. Supp. 1055 (S.D. Ohio 1995).

203. *Id.* at 1065.

204. *Id.* at 1066.

205. *Id.* (emphasis added) (citing 31 U.S.C. § 3730(h)).

206. 913 F.2d 17 (1st Cir. 1990).

207. *Id.* at 20.

208. 931 F.2d 1493 (11th Cir. 1991).

209. *Id.* at 1500 n.13. See also *id.* at 1500–01.

210. *Raytheon*, 913 F.2d at 20.

211. *Williams*, 932 F.2d at 1500.

212. *Wilkins*, 885 F. Supp. at 1066.

213. *Williams*, 932 F.2d at 1499.

specific about the methods of "public disclosure" and does not imply that these are the only examples of public disclosure. Therefore, a government employee telling the information to himself does not amount to public disclosure. In addition, Congress has barred certain actions by specific government employees and, by being so specific, has indicated that other government employees can bring such actions if they are not specifically excluded by the Act and if they meet the other criteria of the Act.²¹⁴

In order that a relator qualify under a section 3730(h) claim, the defendant must know that the plaintiff is engaging in protected activity.²¹⁵ If the employee is engaging in assigned job activities while investigating and gathering information relating to the false claim, it may not be apparent to the employer that such protected activity is taking place.²¹⁶ It is not necessary that the *qui tam* action be brought by the protected individual²¹⁷ nor is it necessary that the plaintiff threaten to file such a suit.²¹⁸ Often the plaintiff has not heard of *qui tam* causes of action until he goes to an attorney after being fired because he blew the whistle. It is necessary that the employee make it known to the employer that he objects to the defrauding of the government and that he requests the employer to either change its activities or engage in one of the other activities which are protected under the statute. "[The] employee must supply sufficient facts from which a reasonable jury could conclude that the employee was discharged because of activities which gave the employer reason to believe that the employee was contemplating a *qui tam* action against it."²¹⁹ "Internal whistle-blowing" is sufficient to evoke the protection of the statute.²²⁰

XII. RIGHT TO AMEND COMPLAINT

The plaintiff has a right to amend his complaint at least once to eliminate any deficiencies found by the court. With regard to the right to amend the complaint, the Eleventh Circuit held, in *Cooper v. Blue Cross and Blue*

214. *Id.* See also *id.* at 1503.

215. *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994).

216. *Wilkins*, 885 F. Supp. at 1066.

217. See *Mikes v. Strauss*, 889 F. Supp. 746, 752 (S.D.N.Y. 1995); *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F. Supp. 583, 595 (N.D. Cal. 1994); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 723-24 (E.D. Cal. 1993).

218. *Mikes*, 889 F. Supp. at 753 (alteration in original).

219. *Id.*

220. 31 U.S.C. § 3730(h).

Shield of Florida, Inc.,²²¹ that “Cooper is entitled to one chance to amend the complaint and bring it into compliance with the rule.”²²² The court in *Griggs v. Hinds Junior College*²²³ held:

The Federal [R]ules of Civil Procedure provide that ‘leave [to amend the complaint] shall be freely given when justice so requires.’ Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim We think the refusal to grant leave was not a valid exercise of the district court’s discretion, rather it was ‘merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.’²²⁴

The court in *Lockett v. General Finance Loan Co.*²²⁵ held: “that it was an abuse of discretion not to grant Lockett’s motion to amend the complaint”²²⁶ In *Hildebrand v. Honeywell, Inc.*²²⁷ the court stated that “if the basis of the district court’s dismissal of plaintiff’s complaint was their failure to prosecute, we find that the court’s ruling was an abuse of discretion.”²²⁸ The *Hildebrand* court continued:

Moreover, Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be freely given when justice so requires. Permission should be denied only if it appears to a certainty that plaintiffs cannot state a claim showing they are entitled to relief or defendant will be unduly prejudiced.²²⁹

XIII. THE FILED RATE DOCTRINE

There are a number of cases which are categorized by the nature of the defendant. Utility companies, such as electric and telephone companies, which are undoubtedly “deep pockets,” are controlled by the laws of their

221. 19 F.3d 562 (11th Cir. 1994).

222. *Id.* at 568–69.

223. 563 F.2d 179 (5th Cir. 1977).

224. *Id.* at 179–80 (citations omitted) (alterations in original).

225. 623 F.2d 1128 (5th Cir. 1980).

226. *Id.* at 1132.

227. 622 F.2d 179 (5th Cir. 1980).

228. *Id.* at 181.

229. *Id.* at 182. See also *Griggs*, 563 F.2d at 180.

states, generally through a public service commission. The commission regulates the rates which the utility can charge for its services, these rates being known as the "filed rates." The "filed rate doctrine" essentially states that the court does not have the power to change a rate for a utility charge that has been set by the public service commission or equivalent body of a state. Only the public service commission can make that change and the change will be reflected in later rates.

In the *en banc* opinion of *Taffet v. Southern Co.*²³⁰ the court stated that "the filed rate doctrine recognizes that where a legislature has established a scheme for utility rate-making, the rights of the rate-payer in regard to the rate he pays are defined by that scheme."²³¹ In addition, the *Tuffet* court pointed out that "federal courts have applied the filed rate doctrine in a variety of contexts to bar recovery by those who claim injury by virtue of having paid a filed rate."²³² In *Wegoland Ltd. v. NYNEX Corp.*,²³³ the court held that "[t]he filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable"²³⁴ and also held that the filed rate doctrine bars Federal RICO and associated causes of action based upon an alleged scheme by NYNEX to obtain inflated rates.²³⁵ Judge Brandeis's ruling in *Keogh v. Chicago & Northwestern*²³⁶ is quoted by the *Wegoland* court.²³⁷

[T]he legal rights between a regulated industry and its customers with respect to rates are controlled by and limited to the rates filed with and approved by the appropriate regulatory agency, and that any attempt to reassess the reasonableness of rates would require the judiciary to "reconstitut[e] the whole rate structure" of the industry.²³⁸

The *Wegoland* court found that the filed rate doctrine is still applicable even when there are allegations of fraud upon the regulatory agency itself.²³⁹

230. 967 F.2d 1483 (11th Cir. 1992).

231. *Id.* at 1490.

232. *Id.* at 1488.

233. 27 F.3d 17 (2d Cir. 1994).

234. *Id.* at 18.

235. *Id.*

236. 260 U.S. 156 (1922).

237. *Wegoland*, 27 F.3d at 19.

238. *Id.* (quoting *Keogh*, 260 U.S. at 163).

239. *Wegoland*, 27 F.3d at 22.

In *Sun City Taxpayers' Ass'n v. Citizens Utilities Co.*,²⁴⁰ the plaintiffs claimed that the water and sewer utility perpetrated a complex accounting fraud that misrepresented to the Association the actual operating costs and resulted in a large sum of money being paid to the utility.²⁴¹ The Second Circuit once more applied the filed rate doctrine as it had in *Wegoland*,²⁴² holding that: "(1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set utility rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime."²⁴³

The basis for these decisions is identified by the court in *Sun City*²⁴⁴ and is discussed again by the court in *Wegoland*:

If courts were licensed to enter this process under the guise of ferreting out fraud in the rate-making process, they would unduly subvert the regulating agencies' authority and thereby undermine the stability of the system. For only by determining what would be a reasonable rate absent the fraud could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids.²⁴⁵

While *Wegoland* involved RICO claims, the filed rate doctrine has been applied in other actions.²⁴⁶

The filed rate doctrine is essentially based on public policy. If the court were to determine that a rate had been set based on false information and then determine what the rate should have been in order to evaluate damages, it would be second guessing the Association. Besides having the court override the Association which set the rate, a factor which is clearly against public policy pursuant to *Wegoland* and *Sun City*, it would also permit the

240. 45 F.3d 58 (2d Cir. 1995).

241. *Id.* at 61.

242. *Wegoland*, 27 F.3d at 21.

243. *Sun City*, 45 F.3d at 62. See also *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 490 (8th Cir. 1992).

244. *Sun City*, 45 F.3d at 62.

245. *Wegoland*, 27 F.3d at 21.

246. See, e.g., *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986) (antitrust); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 584-85 (1981) (breach of contract); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Comm'n*, 341 U.S. 246, 251-53 (1951) (fraud).

party who brought the suit to get relief, while the parties who were equally effected but were not involved in the suit do not get relief.

In *United States ex rel. John Murray v. Bellsouth Telecommunications, Inc.*,²⁴⁷ the argument that under the FCA there are two possible penalties assessed against the defendant, triple damages and a fine for each transgression. The penalty for each transgression remains even if the government has suffered no damages and therefore there is no need to assess damages for the assessment of the fine. On the basis of the filed rate doctrine, there can be no damages as the rate charged is never "wrong" even if it is set because of alleged fraudulent representations. In addition, in a false claims suit, only the government and the relator can bring such a suit so there is no inequality with relation to other rate payers. The court in *Murray* concluded that:

The FCA also provides for a penalty of between \$5,000 and \$10,000 for each violation of the act. The penalty is mandatory. The Court has been unable to find any legislative history or cases regarding how a court should determine the exact amount of the penalty to be imposed for each violation. The Court notes that "[the] range in the amount of forfeitures apparently represents congressional intent to allow discretion in assessing forfeitures." The Court concludes that as long as any civil penalty imposed upon the Defendant is not based upon any consideration of the actual damages suffered by the Government, then the filed rate doctrine does not bar the Plaintiff's claim for civil penalties under §3729(a).²⁴⁸

Although this was only a district court ruling, the argument may prevail in other cases against publicly regulated defendants and permit *qui tam* actions against publically regulated corporations.

XIV. DAMAGES

The FCA provides double or triple recovery for damages suffered by the United States. The size of the recovery is not only determined by the damage suffered by the government, but by the manner in which that damage is measured and the actual number of claims submitted to the government by the defendant or through an intermediary. There is no standard for measuring damages stated in the statute itself, and often the manner selected by the

247. No. 94-6059 (S.D. Fla. filed January 19, 1994).

248. No. 94-6059, at 6 (S.D. Fla. July 30, 1996) (order denying in part and granting in part defendant's motion to dismiss) (citations omitted).

plaintiff depends on the nature of the false claim. The theory of damages is a complex one, and an analysis of government damages according to different theories is a prudent exercise for the *qui tam* litigator.

As a key case, we must look once more to *United States ex rel. Marcus v. Hess*²⁴⁹ where the court established a simple “out of pocket” measure. How much would the government have paid “but for” the fraudulent actions of the defendants? The difference between that amount and what they did pay is the measure of the government damages according to the *Hess* Court.²⁵⁰ This method does not include the government’s costs related to investigation of the matter, including costs of delays for substandard products.

In *United States v. Bornstein*,²⁵¹ the Court applied the “benefit of the bargain” approach to calculating damages. “The Government’s actual damages are equal to the difference between the market value of the [item] it received and retained and the market value that the [item] would have had if they had been of specified quality.”²⁵² The *Bornstein* Court cited *United States v. Ben Grunstein & Sons Co.*,²⁵³ as a basis for its choice of the benefit of the bargain approach. *Grunstein* identified the measure of damages as “the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received.”²⁵⁴

While the Supreme Court in *Bornstein* used a benefit of the bargain theory of damages, it did not overturn the “out of pocket” measure applied by the *Marcus* Court, which appears to lead the practitioner to believe that the Court will consider any reasonable method of calculating damages which will fairly reimburse the government for its losses and expenses without creating a windfall situation.

Under the FCA, controlling Supreme Court and lower court precedents hold “that the Government need not show actual damages in order to prove a violation of the False Claims Act.”²⁵⁵ In *Marcus*, electrical contractors submitted fraudulent bills to the government for work on numerous projects.

249. 317 U.S. 537 (1943).

250. *Id.* at 552.

251. 423 U.S. 303 (1976).

252. *Id.* at 316 n.13.

253. 137 F. Supp. 197, 205 (D.N.J. 1956).

254. *Id.* at 205.

255. *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D. Pa. 1991); *see also Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States v. Rohleder*, 157 F.2d 126 (3d Cir. 1946).

In some instances, the government discovered that the fraud was committed before payment was made, however, the Supreme Court stated that "[t]he District Court held that failure to show actual damage in these instances would not preclude recovery under the [FCA],"²⁵⁶ and the Supreme Court went on to affirm the district court.²⁵⁷ The Court in *Rex Trailer* reaffirmed the holding in *Marcus* that "there is no requirement, statutory or judicial, that specific damages be shown"²⁵⁸ The Third Circuit Court of Appeals declared this rule in *Rohleder* when it stated that the FCA "permits recovery . . . thereunder without actual damage being proven."²⁵⁹ These holdings are all affirmed by the court in *United States v. Kensington Hospital*.²⁶⁰

The question of consequential damages does not appear to be clear at the present time since the present relevant cases involve the particular facts of the cases in question.

Even if there are no damages, the FCA provides for penalties per incident and the question arises as to the method for counting the number of incidents. For example, in *Bornstein*, the question arose as to the actual number of claims submitted and was confused by the fact that the subcontractor had only submitted three false bills to the contractor whereas the contractor had submitted thirty-five claims to the government. The *Bornstein* Court held that the subcontractor would only be held to three claims since the statute "penalizes a person for his own acts, not for the acts of someone else."²⁶¹ Again the question as to the calculation of the number of claims will have to be taken on a case-by-case basis.

The additional question of the amount of the penalty, whether \$5,000 or \$10,000, or a number in between, has not been answered by the courts and the statute does not provide guidelines. It will be up to each court to assess the exact amount of consequential damages based on the individual facts of each case.

256. *Rex Trailer Co.*, 350 U.S. at 153 n.5.

257. *Marcus*, 317 U.S. at 552-53 (1943).

258. *Rex Trailer Co.*, 350 U.S. at 152.

259. *Rohleder*, 157 F.2d at 129.

260. *Kensington Hosp.*, 760 F. Supp. at 1128.

261. *Bornstein*, 423 U.S. at 312.

XV. TYPES OF RECENT CASES

While it appears that a number of different types of cases could be brought against *qui tam* defendants, the cases that bring in the major recovery for plaintiffs fall into certain specific categories:

- A) Medicare Fraud²⁶²
- B) Defense Contractor Fraud²⁶³
- C) Environmental Law Compliance²⁶⁴
- D) Bid rigging with actual false claim²⁶⁵
- E) Agricultural Supplements²⁶⁶
- F) Overcharging and/or product substitution and/or falsifying services performed²⁶⁷

It appears that in every instance where the United States pays a bill, is paid, or where it gives money to a state from which other claims are paid, that there is the potential for a *qui tam* suit.

XVI. CONCLUSION

The dramatic increase in the number of *qui tam* cases in the past few years, the size of the awards, and the intricacies of the legal questions regarding *qui tam* indicate that *qui tam* is an area of the law that must be watched closely.

262. See e.g., *Mikes v. Strauss*, 889 F. Supp. 746 (S.D.N.Y. 1995).

263. *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

264. *Pickens v. Kanawha River Towing*, 916 F. Supp. 702 (S.D. Ohio 1996).

265. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991).

266. *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325 (E.D. Cal. 1995) (mem.). A reverse false claim was submitted to the government by commodity handlers who had exceeded their quotas for growing specific fruits and who were therefore subject to a fine under the Agricultural Marketing Agreement Act and who submitted false information so that they would not have the fine imposed upon them.

267. See, e.g., *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720 (E.D. Cal. 1993).

Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process

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I. OVERVIEW

This note discusses one significant change made by a series of new legislation regarding immigration, namely, the new authority vested in the Immigration and Naturalization Service ("INS") to remove undocumented aliens found in the interior of the country without judicial review. Part II reviews the current conditions of illegal immigration in the United States. Part III distinguishes the two categories of undocumented aliens based on the immigrant's entry status. Part IV examines the new legislation as it applies to illegal immigrants who seek entry into the United States. Part V discusses procedural due process concerns raised by the change made by the new law. Part VI concludes with a summary of the significance of the new law in addressing the problem of illegal immigration in the United States.

II. INTRODUCTION

Between four and five million illegal aliens currently populate the United States. Approximately eighty percent of them live in only seven states: Arizona, California, Florida, Illinois, New Jersey, New York, and

Texas.¹ An estimated 400,000 additional illegal aliens enter the United States each year.² One major area of concern raised by this growing number of undocumented aliens is employment.³ Nearly thirty percent of all jobs in the United States require low-skilled work, which illegal aliens typically seek.⁴ Professor Donald Huddle of Rice University claims that for every twenty undocumented aliens working in this country, thirteen Americans are out of jobs.⁵ The economic cost, according to Huddle, may run as high as thirty billion dollars a year in unemployment payments, services, and lost taxes.⁶

In the early 1970s, the Federal Government's attention to immigration heightened. At that time, Haitians began a steady migration to the United States. By 1981, the number of undocumented Haitians living in the South Florida area was estimated at thirty-five thousand.⁷ The number of Haitian immigrants, however, paled somewhat in the face of the Cuban migration of 1980. The Mariel boatlift or "Freedom Flotilla" brought approximately 125,000 Cubans to the United States within a matter of weeks.⁸ Today, the number of illegal aliens estimated in this country continues to grow.⁹ Contributing substantially to the illegal population is the influx of approximately 250,000 undocumented Mexican aliens that cross the border into Texas every year.¹⁰ The increasing number of illegal aliens and their calculated burden imposed on the seven states with heavier concentrations of illegal aliens have caused some politicians to seek action.¹¹

On March 14, 1995, Florida Governor Lawton Chiles appeared before the Senate Subcommittee on Immigration to request reimbursement for the

1. John Boehner, *Immigration in the National Interest Act*, FED. DOCUMENT CLEARING HOUSE, Mar. 18, 1996, at 4, available in 1996 WL 8784701.

2. *Id.* at *5.

3. David Goddy, *Illegal Immigrants: What They Cost, What They Contribute*, SCHOLASTIC UPDATE, Sept. 6, 1985, at 12, available in LEXIS, News Library, Arcnws File.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Jean v. Nelson*, 711 F.2d 1455, 1464 (11th Cir. 1983), *cert. granted*, 469 U.S. 1071 (1984), *aff'd*, 472 U.S. 846 (1984).

8. *Id.* at 1464.

9. Dick Kirschten, *After The Flood, Boom Times?*, 26 THE NAT'L J. 91, Jan. 8, 1994, at 12, available in LEXIS, News Library, Arcnws File.

10. Gretchen Parker, *Study Cites Inaccuracies in Illegal Immigrant Data*, HOUSTON CHRON., Oct. 5, 1995, at 6.

11. Ellen Debenport, *Chiles Now Has Captive Audience on Immigration Series*, ST. PETE. TIMES, Mar. 15, 1995, at 4B.

one billion dollars a year the State spends for education, medical care, and a justice system for illegal immigrants.¹² Requests like these, as well as the growing concern over terrorism in this country,¹³ prompted Congress to make changes in the immigration laws.¹⁴ On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").¹⁵ One week later, the Senate voted to amend certain provisions in the AEDPA including the replacement of expedited procedures for removing undocumented aliens seeking entry into this country (as well as illegal aliens found in the interior of the United States) with a less stringent process.¹⁶ Following months of debate concerning the amendments proposed by the Senate, on the issue of expedited removal procedures, the legislature struck a compromise which closely resembled the original version of the AEDPA.¹⁷ On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").¹⁸ With regard to the issue under discussion in this note, the IIRIRA makes only slight conceptual changes to the law under the AEDPA while leaving its substantive effect intact.

III. BACKGROUND

The legal rights of aliens vary according to their status under the Immigration and Nationality Act of 1952 ("INA").¹⁹ Two categories of aliens were developed based on the alien's entry status: deportable aliens and excludable aliens.²⁰ If the alien had effected an "entry" into the United

12. *Id.*

13. Recent acts of terrorism commonly cited in legislative discussion include the 1993 bombing of the World Trade Center, the 1995 bombing of the federal building in Oklahoma City, and the 1988 bombing of Pan Am flight 103.

14. Thomas Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 205 (1996).

15. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8 U.S.C.).

16. *Senate Votes to Amend Terrorism Bill, Criminal Aliens Feel Impact*, 73 INTERPRETER RELEASES 650 (1996).

17. *Clinton Vows Veto of Immigration Bill if Gallegly Amendment is Included*, 73 INTERPRETER RELEASES 1111, 1112 (1996).

18. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

19. *Jean*, 711 F.2d at 1466.

20. Debora A. Gorman, *Indefinite Detention: The Supreme Court's Inaction Prolongs the Wait of Detained Aliens*, 8 GEO. IMMIGR. L.J. 47, 49 (1994).

States, whether lawfully or otherwise, and upon the INS' finding of statutory reasons for the alien's removal from this country, the alien was "deportable" and required a more extensive procedural course for removal.²¹ On the other hand, aliens who had not yet "entered" this country and met the statutory requirements for removal²² were "excludable" and were afforded less procedural due process rights in an adjudication of their claim of entry.²³

The INA defined "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise . . ."²⁴ An alien who had entered this country and was subject to deportation was protected by the constitutional right to procedural due process.²⁵ As part of this procedural due process, the deportable alien had the right to advance notice of the charges against him.²⁶ The alien was given a hearing before an immigration judge where the burden of proof was placed on the government.²⁷ He had the privilege of being represented by counsel (at no expense to the Government) and was given reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government.²⁸ Final deportation orders entered against an alien were reviewable directly in federal courts of appeal.²⁹ Other determinations made in the course of deportation proceedings were also reviewable on appeal, as well as determinations that were made incident to motions to reopen such proceedings.³⁰

An alien who was seeking entry into the United States and was subject to exclusion was limited in procedural rights as compared to an alien subject to deportation. Prior to the enactment of the AEDPA, an alien seeking entry who was found to be excludable by an immigration officer at the port of arrival (e.g., the alien was attempting to enter without legal documentation) would be detained for further inquiry to be made by an immigration judge.³¹ In such proceedings before the immigration judge, the excludable alien had

21. 8 U.S.C. § 1251(a) (1994).

22. 8 U.S.C. § 1182 (1994).

23. *Jean*, 711 F.2d at 1467.

24. 8 U.S.C. § 1101(a)(13) (1994).

25. *Shaughnessy v. United States*, 345 U.S. 206, 213 (1953).

26. 3A AM. JUR. 2D *Aliens and Citizens* § 1135 (1986).

27. *Id.* § 1149.

28. 8 U.S.C. § 1252(b) (1994).

29. 3A AM. JUR. 2D *Aliens and Citizens* § 1247 (1986).

30. *Id.*

31. 8 U.S.C. § 1225(b) (1994).

the privilege of being represented by counsel at no expense to the Government.³² During an exclusion hearing, a record of the proceedings was kept.³³ An alien who was excluded from the United States by a decision from the immigration judge, while not entitled to judicial review, was entitled to administrative review.³⁴ Both excludable and deportable aliens had the right to habeas corpus review with certain individual limitations on the scope of the review.³⁵

Under this system of illegal alien removal, aliens entering the country unlawfully were afforded greater constitutional rights in their removal than aliens who presented themselves to the proper immigration authorities for entry and had their admission request denied or delayed for something as minor as improper documentation.³⁶ Unfortunately, this scheme rewarded the aliens who surreptitiously gain entry through unlawful means and served to punish those aliens who sought entry in this country through the proper channels.³⁷ With respect to this anomalous dispensation of due process among deportable and excludable aliens, the AEDPA and the IIRIRA make a significant change.

IV. THE NEW LEGISLATION

The IIRIRA substantially changes the way excludable aliens may be removed from this country by amending the INA to read:

(b)(1)(A)(i) In general.—If an immigration officer determines that an alien . . . [other than a Cuban] who is arriving in the United States or is described in clause (iii)³⁸ is inadmissible under section 1182(a)(6)(C)³⁹ or 1182(a)(7),⁴⁰ the *officer* shall order the alien

32. 8 U.S.C. § 1362 (1994).

33. 8 U.S.C. § 1226(a) (1994).

34. *Id.* § 1226(b).

35. *See* 8 U.S.C. § 1105a(d)(1)(A)–(D) (1994). *Compare* 8 U.S.C.A. § 1105a(e)(2)(A)–(C) (West Supp. 1996).

36. Gorman, *supra* note 20, at 49.

37. *Id.*

38. Clause (iii) refers to undocumented aliens found in the United States who have not been physically present in the country continuously for the prior two years. 8 U.S.C.A. § 1225 (West Supp. 1997).

39. 8 U.S.C.A. § 1182(a)(6)(C) (West Supp. 1997). The text of the statute provides: "(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable." *Id.*

removed from the United States *without further hearing or review* unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.⁴¹

This section of the statute apparently gives the INS the authority to remove an excludable alien from the country solely upon its own determination without the necessity of a hearing before an immigration judge. The IIRIRA further expands on this provision of limited judicial review by providing that "no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim," arising from the expedited removal process.⁴² No court will have jurisdiction to enter declaratory, injunctive, or other equitable relief, or to certify a class.⁴³ Judicial review is limited only to habeas corpus proceedings.⁴⁴ Even so, such proceedings are limited to determinations of: 1) whether the petitioner is an alien; 2) whether the petitioner was ordered removed pursuant to the summary removal procedures; and 3) whether the petitioner is a lawful permanent resident, has been admitted as a refugee under section 207 of the INA, or has been granted asylum under section 208.⁴⁵ If the court determines that the alien was not subject to expedited removal, the court may not grant any relief beyond requiring that the alien be given a hearing.⁴⁶ Furthermore, in an action against an alien for improper entry or re-entry under section 275 of the INA (entry at improper place and concealment of facts) or

40. *Id.* § 1182(a)(7)(A)(i). The text of § 1182 provides:

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or . . . other valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title, is excludable.

Id.

41. *Id.* § 1225(b)(1)(A)(i) (alteration in original).

42. *Id.* § 1252(a)(2)(A).

43. 8 U.S.C.A. § 1252(e)(2).

44. *The 1996 Immigration Act: Asylum and Expedited Removal—What the INS Should Do*, 73 INTERPRETER RELEASES 1565, 1572 (1996) [hereinafter *Asylum and Expedited Removal*].

45. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Section-by-Section Summary*, 73 INTERPRETER RELEASES 1317, 1337 (1996) [hereinafter *Illegal Immigration*].

46. *Id.*

section 276 of the INA (reentry of deported aliens), no court shall have jurisdiction to hear claims collaterally attacking the validity of orders of exclusion.⁴⁷ The IIRIRA also precludes administrative review of an exclusion order, except in cases of aliens who claim that they are permanent residents.⁴⁸ The Attorney General shall provide a prompt review of a claim made by an alien who maintains, under oath or under penalty of perjury, that they have been lawfully admitted for permanent residence.⁴⁹

This new authority to summarily exclude an undocumented alien was broadened even further by the following provision in the AEDPA found in 8 U.S.C. § 1251:

(d) Notwithstanding any other provision of this subchapter, an alien found in the United States who has not been admitted to the United States after inspection in accordance with section 1225⁵⁰ is deemed for purposes of this chapter to be seeking entry and admission to the United States and shall be subject to examination and exclusion by the Attorney General under part IV of this subchapter.⁵¹ In the case of such an alien the Attorney General shall provide by regulation an opportunity for the alien to establish that the alien was so admitted.⁵²

Prior to the enactment of this law, the rather broad statutory definition of “entry” was left to the courts to interpret when applying the term to excludable aliens. In the case of *In re Phelisna*,⁵³ a boat carrying approximately 200 undocumented Haitian immigrants landed on a beach near Miami.⁵⁴ While walking across a nearby causeway, Phelisna was apprehended by officials.⁵⁵ Phelisna claimed that she had made an entry into the United States and therefore qualified for the more comprehensive deportation proceeding rather than exclusion proceedings.⁵⁶ The court noted that

47. 8 U.S.C.A. § 1225(b)(1)(D) (West Supp. 1997).

48. *Id.* § 1225(b)(1)(C).

49. *Id.*

50. *Id.* § 1225. This section references § 235 of the AEDPA entitled “Inspection by Immigration Officers.”

51. Chapter Four of the AEDPA was entitled: “Terrorist and Criminal Alien Removal and Exclusion.”

52. 8 U.S.C.A. § 1251 (West Supp. 1996).

53. 551 F. Supp. 960 (E.D.N.Y. 1982).

54. *Id.* at 961.

55. *Id.*

56. *Id.* at 962.

"the statute cannot be read to mean that mere presence in the United States is enough to show an entry."⁵⁷

In the case of *In re Pierre*,⁵⁸ a small boat of Haitian immigrants became distressed at sea and was towed into West Palm Beach.⁵⁹ Once in port, the INS determined that the group did not appear to be entitled to entry and, under the old statute, their case was referred to an immigration judge.⁶⁰ While waiting for their case to be heard, the immigrants were paroled from detention into the custody of a group of ministers.⁶¹ After a claim for political asylum was denied, the petitioners claimed that their removal should be heard in deportation proceedings since they had made an entry into this country.⁶² The court in *Pierre* set out its conclusions of the elements of entry: "An 'entry' involves (1) a crossing into the territorial limits of the United States, i.e., physical presence; plus (2) inspection and admission by an immigration officer; or (3) actual and intentional evasion of inspection at the nearest inspection point; coupled with (4) freedom from restraint."⁶³

The AEDPA appeared to clarify the previous statutory ambiguity concerning entry in section 1251(d) and essentially eliminated the third and fourth elements of the court's analysis. Undocumented aliens found in the interior of the country, under the AEDPA, were considered to be seeking entry and therefore met the requirements for the more expeditious exclusion proceedings, regardless of their previous ability to elude immigration officials.

In section 301(a) of the IIRIRA, the new law supersedes the AEDPA by replacing the definition of "entry" with the concept of "admission."⁶⁴ The terms "admission" and "admitted" now refer to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."⁶⁵ In addition, the law replaces the term "excludable" throughout the INA with the term "inadmissible."⁶⁶ The IIRIRA only delineates

57. *Id.* See also *Brancato v. Lehmann*, 239 F.2d 663, 665 (6th Cir. 1956).

58. 14 I. & N. Dec. 467 (1973).

59. *Id.*

60. *Id.* at 468.

61. *Id.*

62. *Id.*

63. *In re Pierre*, 14 I. & N. Dec. at 468 (citations omitted).

64. *The 1996 Immigration Act: Grounds of Inadmissibility and Deportability and Available Waivers*, 73 INTERPRETER RELEASES 1641, 1642 (1996).

65. *Id.* (quoting 8 U.S.C.A. § 1101(a)(13)(A) (West Supp. 1997) (as amended)).

66. *Id.* at 1641.

between “inadmissible” aliens who are subject to the statutory “screening” process, which is in essence an expedited removal procedure similar to the exclusion process of the AEDPA, and aliens who are subject to removal proceedings, which is similar to the deportation procedure under the AEDPA. Under the IIRIRA, an alien who is encountered by the INS after they have entered the United States, and who in removal proceedings cannot show by clear and convincing evidence that they were lawfully admitted, will have the burden of showing that they are admissible.⁶⁷ The change in terminology made by the IIRIRA may appear to be a matter of semantics, but this change may have avoided what some might have considered a legal fiction in the AEDPA with respect to “entering” this country. Nevertheless, the IIRIRA leaves intact the underlying effect of the change in “entry” status originally made by the AEDPA. The enlarged authority given to the INS to summarily remove aliens found in the United States who have not been admitted without judicial review raises concerns for those aliens who are in this country illegally and are seeking political asylum.

A person may apply for asylum by two methods—affirmatively or defensively.⁶⁸ If the person seeks asylum affirmatively, then the person files

67. *Id.* The text of the IIRIRA concerning “admission” provides:

(13)(A) The terms “admission” and “admitted” mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien –

- (i) has abandoned or relinquished that status,
- (ii) has been absent from the United States for a continuous period in excess of 180 days,
- (iii) has engaged in illegal activity after having departed the United States,
- (iv) has departed from the United States while under the legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
- (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
- (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

8 U.S.C.A. § 1101(a)(13).

68. Maureen O. Hurley, *The Asylum Process: Past, Present, and Future*, 26 NEW ENG. L. REV. 995, 1013 (1992).

his or her claim before the government is aware that the applicant is in this country illegally.⁶⁹ A defensive claim of asylum is filed as a defense to deportation or exclusion charges.⁷⁰ The burden of proof in an asylum case requires the alien to produce evidence of past persecution or a well-founded fear of persecution.⁷¹ The persecution the asylum seeker suffers from must be on account of race, religion, nationality, political opinion, or membership in a particular social group and not merely economic oppression.⁷² Because expedited removal places almost complete decision making authority in the hands of the INS asylum officers, one commentator points out that the applicant will not have the opportunity to present his or her case de novo in front of an immigration judge, nor will the applicant have the ability to appeal an unfavorable decision to the Board of Immigration Appeals.⁷³

In 8 U.S.C. § 1225, the Act addresses how the new provisions of the IIRIRA approach the issue of asylum seekers in removal proceedings. When an immigration officer encounters an alien who has not been admitted into the United States or is suspected of carrying documents that were procured by fraud, the officer will conduct a pre-screening interview to determine whether the alien intends to apply for asylum or fears persecution.⁷⁴ If the officer concludes that the alien does not have an intent to apply for asylum or fear of persecution, the immigration officer can order the alien summarily removed from the United States.⁷⁵ "This officer's removal determination is not subject to any further administrative review, hearing or judicial oversight."⁷⁶

If the immigration officer determines that the alien is inadmissible (notice that under the AEDPA they would have been termed "excludable") and the alien indicates either an intention to apply for asylum or a fear of persecution, the officer must refer the alien for an interview by an asylum

69. *Id.* at 1013.

70. *Id.*

71. *Id.* at 1016.

72. *Id.* at 1017.

73. Stacy R. Hart, *Don't Call U.S., We'll Call You: A Look at Summary Exclusion as a Means of Asylum Reform*, 72 WASH. U. L.Q. 1741, 1756 (1994).

74. *Asylum and Expedited Removal*, *supra* note 44, at 1571.

75. *Id.*

76. *Id.* The pre-screening process does not apply to Cuban immigrants arriving by plane by operation of 8 U.S.C.A. § 1225, which states: "[s]ubparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." *Id.* § 1225(b)(1)(F).

officer.⁷⁷ The asylum officer will determine whether the alien has a "credible fear" of persecution.⁷⁸ A summary of the remaining process in asylum determinations under the IIRIRA is as follows:

If applicants do not demonstrate "credible fear" they will be removed without further review unless they request review by an immigration judge (IJ). The IJ review must be within seven days of the asylum officer's decision, during which time the applicant is to be detained. If credible fear is demonstrated, the applicant will be detained pending "non-expedited" consideration of the application. Aliens may consult with anyone prior to their asylum interview or review, but at no expense to the government. The consultation must not "unreasonably delay the process."⁷⁹

Note that the review by the immigration judge is limited to inspection of the immigration officer's determination of "credible fear."⁸⁰ To assist in expediting this review within the seven day requirement, immigration judges may conduct the inspection via a telephonic or video connection rather than in person.⁸¹

V. DUE PROCESS CONCERNS

A. Supreme Court Cases from 1889 to 1902

The underlying issue among all of this legislation is whether the expedited procedures for removing undocumented aliens without judicial review infringes on the immigrant's right to procedural due process. Of the earliest cases concerning the government's authority to exclude aliens is *The Chinese Exclusion Case of 1889*.⁸² In that case, the Supreme Court held that the power of exclusion of foreigners was an incident of sovereignty "belonging to the government of the United States as a part of those sover-

77. *Id.* § 1225(b)(1)(A)(ii).

78. *Id.* § 1225(b)(1)(B)(ii). "Credible fear" of persecution means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under § 1158 of this title. *Id.* § 1225(b)(1)(B)(v).

79. *Illegal Immigration*, *supra* note 45, at 1335.

80. 8 U.S.C.A. § 1225(b)(1)(B)(iii)(III).

81. *Asylum and Expedited Removal*, *supra* note 44, at 1571.

82. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

eign powers delegated by the Constitution”⁸³ In 1892, the Supreme Court had the opportunity to address the due process rights of an excludable alien in *Nishimura Ekiu v. United States*.⁸⁴

In *Nishimura Ekiu*, a Japanese immigrant was stopped at the port of San Francisco and was refused entry after inspection by immigration officials.⁸⁵ The immigrant claimed that her husband was living in the United States but that she did not know his address.⁸⁶ She had twenty-two dollars and told officials that she was supposed to stop at a hotel and wait for her husband to call for her.⁸⁷ The Inspector of Immigration at the port of San Francisco determined that the immigrant was “without means of support, without relatives or friends in the United States . . . and a person unable to care for herself”⁸⁸ The inspector concluded that the immigrant was liable to become a public charge and therefore inhibited her from landing.⁸⁹ The circuit court ruled that an immigration law vesting in immigration officials the exclusive authority to determine a person’s right to land did not deprive that person liberty without due process of law.⁹⁰ Considering this case on appeal, the Supreme Court recognized that the power to exclude or admit foreigners into the United States was a power “vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.”⁹¹ The Supreme Court

83. *Id.* at 609; see also Richard F. Hahn, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

84. 142 U.S. 651 (1892).

85. *Id.* at 652.

86. *Id.*

87. *Id.*

88. *Id.* at 656.

89. *Nishimura Ekiu*, 142 U.S. at 656.

90. *Id.*

91. *Id.* at 659. The Supreme Court elaborated on how the Constitution vests in the national government the authority to admit or exclude aliens:

It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon who the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.

Id. (citing U.S. CONST. art. I, § 8; *Chae Chan Ping v. United States*, 130 U.S. 581, 604, 609 (1889); *Edye v. Robertson*, 112 U.S. 580 (1884)).

determined, as to those immigrants seeking entry into the United States, "the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law."⁹²

Similar conclusions were made by the Supreme Court in *Li Sing v. United States*.⁹³ In *Li Sing*, a Chinese immigrant was denied reentry into this country based on a federal statute prohibiting the entry or reentry of Chinese laborers.⁹⁴ In order for the immigrant to establish that he was previously a merchant in the United States, as opposed to a laborer, and therefore qualified for reentry, the statute required the testimony of two credible witnesses who were not Chinese.⁹⁵ *Li Sing* challenged the statute claiming that it violated the constitutional guarantees of "equal rights and equal law to all."⁹⁶ The Supreme Court answered this claim by recognizing that deportation is not equivalent to punishment for a crime.⁹⁷ The Court reasoned that the deportation of immigrants is a method of enforcing the return of aliens to their own country who have not complied with the conditions, upon the performance of which, the government has determined that the aliens' continuing residence here shall depend.⁹⁸ Accordingly, the Court declared that there was no deprivation of life, liberty, or property without due process of law.⁹⁹

Concluding the early line of Supreme Court cases concerning the due process rights of excludable aliens was *Lee Lung v. Patterson*.¹⁰⁰ In *Lee Lung*, a Chinese immigrant who had spent twenty years in Portland, Oregon as a merchant went back to China and returned to the United States with his wife and daughter.¹⁰¹ The collector of customs at Portland agreed to admit the merchant, but denied entry for his wife and daughter due to a technical discrepancy in their certificates identifying them and their relation with the

92. *Id.* at 660 (citing *Hilton v. Merritt*, 110 U.S. 97 (1884)).

93. 180 U.S. 486 (1901).

94. *Id.*

95. *Id.* at 492.

96. *Id.* at 494.

97. *Id.* See also *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

98. *Li Sing*, 180 U.S. at 495.

99. *Id.* The Supreme Court recognized a delineation between forbidding aliens from entering the country or expelling them from the country and subjecting them to hard labor or confiscating their property. *Id.* The Supreme Court noted that if the latter circumstances were the case, then the aliens would have a right to a judicial trial to establish guilt or innocence. *Id.*

100. 186 U.S. 168 (1902).

101. *Id.* at 169.

merchant.¹⁰² Upon further inquiry, it was discovered that the wife who returned to the United States with the merchant was his second wife (in a polygamous relationship) and the daughter was that of the merchant and his first wife.¹⁰³ Based on the evidence, the immigration officials stood on their denial of entry as to the wife and daughter.¹⁰⁴ The merchant claimed that the applicable statute made the certificates evidence and the collector exceeded his jurisdiction by not giving the certificates valid consideration.¹⁰⁵ The Court cited *Nishimura Ekiu*¹⁰⁶ and noted that it was determined in that case that "Congress might entrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend"¹⁰⁷ The Supreme Court held that if Congress did so, then the executive officer's order was "due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."¹⁰⁸ Therefore, the Court reiterated that because jurisdiction is given to the collector over the right of an alien to land, then jurisdiction is necessarily given to the collector to pass on the evidence presented to establish that right.¹⁰⁹

B. Supreme Court Cases from 1950 to Present

Shortly after World War II and almost fifty years since *Lee Lung*, the Supreme Court made the determination that admission into the United States was a privilege and not a claim of right in *Knauff v. Shaughnessy*.¹¹⁰ In *Knauff*, a United States Army veteran of World War II returned from Germany in 1948 with a German born wife.¹¹¹ Immigration officials entered a final order of exclusion against the German woman without a hearing

102. *Id.*

103. *Id.* at 173. The Supreme Court pointed out that even though plural marriages may be recognized in China, the laws of the United States do not consider them valid and therefore Lee Lung's second wife is not his valid wife under the laws of this country. *Id.*

104. *Lee Lung*, 186 U.S. at 173.

105. *Id.* at 168.

106. 142 U.S. at 651.

107. *Lee Lung*, 186 U.S. at 175.

108. *Id.*

109. *Id.* at 176. See also *Lee Gon Young v. United States*, 185 U.S. 306 (1902); *Fok Young Yo v. United States*, 185 U.S. 296 (1902); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895).

110. 338 U.S. 537 (1950).

111. *Id.* at 539.

based on security reasons.¹¹² The Supreme Court began its analysis of this case by ruling that an alien seeking entry into this country does so under no claim of right.¹¹³ The Court held that “[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government.”¹¹⁴ The Court explained that because the exclusion of aliens is a fundamental act of sovereignty, the right is inherent in the executive power to control the foreign affairs of the nation and does not stem from legislative power alone.¹¹⁵ Therefore, according to the Court, the decision to admit or exclude an alien is lawfully placed with the President, “who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General.”¹¹⁶ The Court stated that “[t]he action of the executive officer under such authority is final and conclusive.”¹¹⁷ As to those persons seeking entry into the United States, the Court concluded that whatever the rule may be concerning the removal of such persons, “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”¹¹⁸

Further support for the Court’s view in *Knauff* that rules pertaining to persons seeking entry into this country fall outside the supervision of any court comes from *Kwong Hai Chew v. Colding*.¹¹⁹ Kwong Hai Chew was a Chinese seaman who was admitted to the United States in 1945.¹²⁰ Thereafter Chew married a native American and the two bought a home in New York.¹²¹ Chew was also a World War II veteran having served in the United States Merchant Marines.¹²² After proving his good moral character for the

112. *Id.* Pursuant to the War Brides Act of June 21, 1941, the President, on November 14, 1941, issued a proclamation which stated that the interest of the United States required the imposition of additional restrictions upon the entry into and departure of persons from the United States and he also authorized the promulgation of regulations jointly by the Secretary of State and the Attorney General. *Id.* at 540–41.

113. *Id.* at 542.

114. *Knauff*, 338 U.S. at 542.

115. *Id.*; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

116. *Knauff*, 338 U.S. at 543.

117. *Id.*

118. *Id.* See also *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Fong Yue Ting*, 149 U.S. at 698; *Nishimura Ekiu*, 142 U.S. at 651. Cf. *Yamataya v. Fisher*, 189 U.S. 86 (1903).

119. 344 U.S. 590 (1952).

120. *Id.* at 592.

121. *Id.*

122. *Id.* at 593.

preceding five years, in 1949, Chew was admitted to permanent residence in the United States.¹²³ With his petition for naturalization pending and after being screened by the Coast Guard, in 1950, Chew accepted employment as a seaman on a merchant vessel.¹²⁴ The voyage on the merchant vessel which Chew had embarked included ports in the Far East.¹²⁵ Upon the vessel's return to port in the United States, Chew was "excluded" by immigration officials and not permitted to land.¹²⁶ The Supreme Court declined to follow *Knauff* in this case and stated that the decision in *Knauff* "relates to the rights of an alien *entrant* and does not deal with the question of a *resident* alien's right to be heard."¹²⁷ The Supreme Court in *Chew*, however, noted that "[Congress'] authorization of the denial of hearings raises no constitutional conflict if limited to 'excludable' aliens who are not within the protection of the Fifth Amendment."¹²⁸

One month after *Chew*, the Supreme Court heard an unusual story of a man without a country in the case of *Shaughnessy v. United States*.¹²⁹ Ignatz Mezei, an immigrant from Hungary, had lived in this country as a resident alien from 1923 to 1948.¹³⁰ In 1948, Mezei went to Hungary to visit his dying mother, was denied entry by the Hungarian government, and detained for nineteen months due to some difficulty in securing an exit permit.¹³¹ Upon his eventual return to the United States, Mezei's entry was reviewed by immigration officials and permanent exclusion was ordered without a hearing based on concerns for national security.¹³² Mezei was returned to countries he had come from on his trip to Europe; however, France and Great Britain refused to give him permission to land.¹³³ Also, the State Department negotiated with Hungary for Mezei's readmission with no success.¹³⁴ Mezei applied for entry to approximately twelve Latin American

123. *Id.* at 593-94.

124. *Chew*, 344 U.S. at 593-94.

125. *Id.* at 594.

126. *Id.* at 594-95.

127. *Id.* at 596 (emphasis added).

128. *Id.* at 600.

129. 345 U.S. 206 (1953).

130. *Id.* at 208.

131. *Id.* Mezei eventually obtained a quota immigration visa issued by the American Consul in Budapest and proceeded to France where he boarded the *Ile de France* in Le Havre bound for New York. *Id.*

132. *Id.*

133. *Mezei*, 345 U.S. at 209.

134. *Id.*

countries, all of which denied his request.¹³⁵ After twenty-one months of detention on Ellis Island and a series of habeas corpus proceedings, the district judge ordered Mezei's conditional parole on bond when the government declined to divulge evidence proving Mezei's danger to the public safety.¹³⁶

The Supreme Court observed that Mezei, regardless of his prior presence in this country, was seeking entry and fell under the existing immigration laws governing the admissions or exclusions of such aliens.¹³⁷ The Court stated that an exclusion proceeding grounded on danger to the national security, statutorily, does not provide for the detained alien to be released on bond.¹³⁸ Furthermore, the Court noted that the federal statutes provide that exclusion based on confidential information, the disclosure of which may be prejudicial to the public interest, may be conducted without a hearing.¹³⁹ The Court reasoned that because the power to exclude aliens rests with the executive branch to enforce and the legislative branch to enact laws to regulate such enforcement, largely immune from judicial control, then the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case and the procedures elected for carrying out this "fundamental sovereign attribute" is due process of law.¹⁴⁰ Though this case dealt primarily with the issue of detaining excluded aliens, the Supreme Court reaffirmed its earlier findings that due process among aliens who have not been admitted into this country are limited to the protections afforded by Congress.

The most recent Supreme Court case involving the procedural due process rights of excludable aliens was the 1985 case of *Jean v. Nelson*.¹⁴¹ "For almost thirty years before 1981, the INS had followed a policy of general parole for undocumented aliens arriving on our shores seeking

135. *Id.* Mezei then notified the INS that he would exert no further efforts to depart from the United States. *Id.*

136. *Id.* The district judge did not question the validity of the exclusion order but considered further detention excessive and justifiable only by affirmative proof of Mezei's danger to the public safety. *Mezei*, 345 U.S. at 209.

137. *Id.* at 213. *See also* *Polymeris v. Trudell*, 284 U.S. 279 (1932); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895).

138. *Mezei*, 345 U.S. at 216.

139. *Id.* at 210-11.

140. *Id.* at 210 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Knauff*, 338 U.S. at 537; *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

141. 472 U.S. 846 (1985).

admission to this country.”¹⁴² In the late 1970s and early 1980s, the influx of undocumented aliens arriving in South Florida raised concern regarding the unusually large number of immigrants and the current system of detention.¹⁴³ In response to such concerns, the Attorney General in the first half of 1981 ordered the INS to detain without parole any immigrants who could not present a *prima facie* case for admission.¹⁴⁴ The aliens were to remain in detention pending a decision on their admission or exclusion.¹⁴⁵ This new policy of detention rather than parole was not based on a new statute or regulation.¹⁴⁶ A group of Haitian immigrants who were incarcerated and denied parole under the new policy filed a class action suit seeking declaratory and injunctive relief.¹⁴⁷ The group alleged that the INS’ sudden change in policy was unlawfully effected by not complying with the notice-and-comment rule-making procedures of the Administrative Procedure Act (“APA”).¹⁴⁸ The group also alleged that the restrictive parole policy, as executed by INS officers in the field, violated the equal protection guarantee of the Fifth Amendment because it discriminated against petitioners on the basis of race and national origin.¹⁴⁹ The district court held that because the new policy of detention and restrictive parole was not promulgated in accordance with the APA rule-making procedures, the INS’ policy under which petitioners were incarcerated was “null and void,” and the prior policy

142. *Id.* at 849.

143. *Id.* Due to the sudden and massive immigration, President Carter appointed a Select Committee on Immigration to examine the country’s immigration problems and that committee issued a report in February, 1981 finding that an “immigration crisis” existed in the United States. *Jean v. Nelson*, 711 F.2d 1455, 1464 (11th Cir. 1983). The “crisis” passed unresolved to the new Administration and in March 1981, President Reagan appointed a special task force to consider solutions. *Id.* at 1464. The task force included the Secretaries of State, Defense, Transportation, Labor, Commerce, Health and Human Services, and the Director of the Office of Management and Budget. *Id.* One of the solutions recommended by the task force was detaining aliens without parole pending a determination of their right to enter the United States. *Id.*

144. *Jean*, 472 U.S. at 849.

145. *Id.*

146. *Id.*

147. *Id.* at 851. The district court certified the class as “all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings . . . for whom an order of exclusion has not been entered . . .” *Id.* at 849–50 (quoting *Louis v. Nelson*, 544 F. Supp. 973, 1004 (S.D. Fla. 1982)).

148. *Jean*, 472 U.S. at 849.

149. *Id.*

of general parole was restored to "full force and effect."¹⁵⁰ The district court also concluded that the "petitioners had failed to prove discrimination on the basis of race or national origin in the denial of parole."¹⁵¹ Appeals from both sides were made, yet in the meantime, pursuant to the district court's holding, the INS promulgated a new parole policy that was in compliance with the APA and that required evenhanded treatment and prohibited the consideration of race and national origin in the parole decision.¹⁵² Since the INS was no longer detaining any class members under the stricken incarceration and parole policy other than those who have violated the terms of their parole or have arrived subsequent to the district court's judgment, the court of appeals, sitting en banc, held that the APA claim was moot and ruled that the Fifth Amendment did not apply to the consideration of unadmitted aliens for parole.¹⁵³ The court of appeals remanded the case to the district court for consideration of whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin with regard to the remaining Haitian detainees.¹⁵⁴

The Supreme Court held that the court of appeals properly remanded the case to the district court.¹⁵⁵ With great anticipation that the Supreme Court would rule on the constitutional issue involving the due process rights of the excludable aliens, the Court noted that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such

150. *Id.* at 850 (citing *Louis*, 544 F. Supp. at 1006).

151. *Id.*

152. *Id.* at 850–51. The Supreme Court noted that this finding was based on the agreement between the petitioners and respondents that the new rule promulgated by the INS was neutral on its face and required evenhanded treatment of immigrants concerning parole decisions. *Jean*, 472 U.S. at 850–51.

153. *Id.* at 852. The Supreme Court stated:

The question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high-level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act (INA) to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors.

Id. at 852–53 (quoting *Jean v. Nelson*, 727 F.2d 957, 963 (11th Cir. 1984), *cert. granted*, 469 U.S. 1071 (1984), *aff'd*, 472 U.S. 846 (1985)).

154. *Id.*

155. *Id.* at 857.

adjudication is unavoidable.”¹⁵⁶ The Supreme Court held that because the new INS policy and statutes provide petitioners with nondiscriminatory parole consideration, which is all they seek to obtain by virtue of their constitutional argument, therefore there was no need to address the constitutional issue.¹⁵⁷ One commentator criticized the Supreme Court’s refusal to address the constitutional issue by stating, the “Court has failed to vindicate the due process rights of a group of persons who lack representation in the political branches of government and who have no other avenue for recourse.”¹⁵⁸ That rejoins the question of whether excludable aliens have due process rights at all. Justice Marshall, joined by Justice Brennan, wrote a dissenting opinion in *Jean*,¹⁵⁹ where he defended the position that excludable aliens are protected by the Fifth Amendment.

Justice Marshall pointed out that the majority’s decision rested “entirely on the premise that the parole regulations promulgated during the course of this litigation preclude INS officials from considering race and national origin in making parole decisions.”¹⁶⁰ Justice Marshall argued, however, that the majority points to no authority other than arguments in the parties’ briefs, which in turn, according to Justice Marshall, cite to nothing of relevance.¹⁶¹ Justice Marshall then examined the applicable regulations, statutes, and administrative practices governing the parole of unadmitted aliens and concluded that there were not any nonconstitutional constraints on the executive’s authority to make national-origin distinctions.¹⁶² After this examination, Justice Marshall continued that the majority therefore should have addressed the constitutional issue involved, and proceeded with his own analysis of the Fifth Amendment as applied to this case.¹⁶³

156. *Jean*, 472 U.S. at 854 (quoting *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

157. *Id.* at 854–55.

158. Gorman, *supra* note 20, at 54.

159. *Jean*, 472 U.S. at 858 (Marshall, J., dissenting).

160. *Id.*

161. *Id.* at 859. Justice Marshall claimed that the Solicitor General’s representations to the Supreme Court were not supported by citation to any authoritative statement by the Attorney General or the INS to the effect that the statute and regulations prohibit distinctions based on race or national origin. *Id.* Furthermore, Justice Marshall stated that the Solicitor General’s contention that the statute and regulations do not make such distinctions is merely an unsupported assertion by counsel apparently coming from the Solicitor General’s office, to which the Supreme Court owes no deference at all. *Id.* at 865–66.

162. *Jean*, 472 U.S. at 859.

163. *Id.* at 868.

Among the cases cited by the Commissioner of the INS in *Jean*, in support of his constitutional claim that the Fifth Amendment did not apply to excludable aliens, was *Knauff v. Shaughnessy*, *Kwong Hai Chew v. Colding*, and *Shaughnessy v. United States*.¹⁶⁴ Justice Marshall stated that the narrow question decided in *Knauff* and *Shaughnessy* was that the denial of a hearing in a case in which the Government raised national security concerns did not violate due process.¹⁶⁵ Furthermore, Justice Marshall pointed out that the question decided in *Chew* was that the *resident* alien's due process rights *had* been violated.¹⁶⁶ Therefore, according to Justice Marshall, the broad judgment that excludable aliens are not within the protection of the Fifth Amendment is dicta and deserves no deference at all.¹⁶⁷

Justice Marshall then made his argument, based on logic, for the application of the Fifth Amendment to excludable aliens. He observed that when an alien detained at the border is criminally prosecuted in this country, he must enjoy at trial all of the protections that the Constitution provides to criminal defendants.¹⁶⁸ Justice Marshall stated, "[s]urely it would defy logic to say that a precondition for the applicability of the Constitution is an allegation that an alien committed a crime."¹⁶⁹ Justice Marshall posited that there is "no basis for conferring constitutional rights only on those unadmitted aliens who violate our society's norms."¹⁷⁰

Justice Marshall noted that the Fourteenth Amendment provides that "[n]o state . . . shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹⁷¹ Justice Marshall stated that the Supreme Court

164. *Id.* at 868-69.

165. *Id.*

166. *Id.* at 872.

167. *Jean*, 472 U.S. at 872-73.

168. *Id.* at 873. Justice Marshall quoted *Wong Wing v. United States*, 163 U.S. 228 (1896), in which the Court stated, in dictum, that "while Congress can 'forbid aliens or classes of aliens from coming within [our] borders,' it cannot punish such aliens without 'a judicial trial to establish the guilt of the accused.'" *Jean*, 472 U.S. at 873 (quoting *Wong Wing*, 163 U.S. at 237). Also, Justice Marshall claimed that the right of an unadmitted alien to Fifth Amendment due process protections at trial is universally respected by the lower federal courts and is acknowledged by the government. *Id.* See also *United States v. Henry*, 604 F.2d 908, 912-13 (5th Cir. 1979); *United States v. Casimiro-Benitz*, 533 F.2d 1121 (9th Cir.), *cert. denied*, 429 U.S. 926 (1976).

169. *Jean*, 472 U.S. at 873.

170. *Id.*

171. *Id.* at 875.

employed this standard in the case of *Plyler v. Doe*.¹⁷² In *Plyler*, a Texas law allowed the withholding of state funds to school districts for the education of children not “legally admitted” into the United States and also authorized the denial of enrollment in public schools to these children.¹⁷³ While ruling that the state’s law was unconstitutional, Justice Marshall argued that the Supreme Court made it clear that the Fourteenth Amendment applies to aliens by quoting the Court in *Plyler*, which stated, for “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”¹⁷⁴ Justice Marshall contends that this constitutional recognition and protection of aliens under the Fourteenth Amendment as applied to the states should also be found under the Fifth Amendment.¹⁷⁵

According to Robert D. Ahlgren, writing for the *Practicing Law Institute*, courts that have dealt with AEDPA issues have avoided constitutional analysis almost completely.¹⁷⁶ “The court which took up the due process issue was a panel of the [Ninth Circuit Court of Appeals] and cited a progeny of *Knauff-Megei* [sic].”¹⁷⁷ The circuit court in *Duldulao v. INS*¹⁷⁸ held that section 440(a) of the AEDPA denying judicial review of deportation orders for aliens convicted of firearm offenses did not offend due process.¹⁷⁹ In its discussion of the AEDPA, the circuit court stated that “[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”¹⁸⁰ The circuit court further explained that “[t]he power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.”¹⁸¹

172. *Id.* at 875 (referring to *Plyler v. Doe*, 457 U.S. 202 (1982)).

173. *Plyler*, 457 U.S. at 206–07.

174. *Jean*, 472 U.S. at 875 (quoting *Plyler*, 457 U.S. at 210).

175. *Id.*

176. Robert D. Ahlgren, *Procedural Due Process in Exclusion/Deportation*, in *PRACTICING LAW INSTITUTE* 1996, at 78 (PLI Corp. L. & Practice Course Handbook Series No. 71, 1996).

177. *Id.* (citing *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996) (as amended on Oct. 8, 1996)).

178. 90 F.3d 396 (9th Cir. 1996). See *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996).

179. *Duldulao*, 90 F.3d. at 399–400.

180. *Id.* at 399 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

181. *Id.* at 400 (quoting *Carlson v. Landon*, 342 U.S. 524, 537 (1951)).

VI. CONCLUSION

This country was founded by people who were trying to escape tyranny and longed for a life based on freedom. These people who fought to establish the United States of America and drafted its Constitution were immigrants themselves. Since then, the United States has traditionally been a place of refuge for those who seek to escape oppression from abroad. As a result, this country has the most open-door immigration policy in the world.¹⁸² Between 1921 and 1986 approximately 650,000 legal immigrants were admitted to the United States each year.¹⁸³ In 1995, the number of legal immigrants admitted to this country rose to 800,000.¹⁸⁴ As the number of immigrants in this country, legal and illegal, continue to grow, so too does the population. As of January 1, 1996, the population in the United States was 264,290,000 people.¹⁸⁵ America is known as the land of opportunity, yet for the average worker that opportunity is finite. Currently, the unemployment rate in this country is 5.6%.¹⁸⁶ But in 1944, the unemployment rate was merely 1.2% and in the mid-to-late 1960s it rested in the 3% range.¹⁸⁷ The proliferation of illegal aliens in this country has grown to the point that it has moved to the forefront in legislative debate. The statistical data and effect that illegal aliens have on the United States economy requires something to be done. As a country willing to help immigrants who are oppressed, the United States must be watchful for those who seek to take advantage of our assistance and burden the welfare of United States citizens.

The IIRIRA takes bold steps towards addressing the ever growing problem of undocumented aliens in this country. The additional authority given to the INS may help make the process of removing illegal aliens more efficient. In 1995, approximately 80% of the 110,000 cases decided by immigration judges involved undocumented aliens found in the interior of

182. *Senate Approves Omnibus Immigration Bill After Removing Exclusion Provision*, 73 INTERPRETER RELEASES 601, 603 (1996).

183. Susan Crabtree, *Immigration Crossroads*, INSIGHT, Mar. 25, 1996, at 4, available in 1996 WL 8310958.

184. *Id.*

185. *Factoids*, RESEARCH ALERT, June 7, 1996, at 1, available in 1996 WL 8842298.

186. Richard Estrada, *Work Details Forget the Hype, Your Job Isn't Secure, Americans Are Concerned About Current and Future Job Prospects, and for Good Reason*, CHI. TRIB., May 1, 1996, at A15.

187. *Id.*

the country.¹⁸⁸ The new law may possibly free up the dockets of immigration courts, making more room for cases meriting a decision by an immigration judge.

Though the IIRIRA vests authority in the INS officer to summarily remove an undocumented alien found in the United States, the new law is not without its own checks and balances. The IIRIRA supplies an in-depth screening process of cases involving immigrants who may be truly fleeing persecution by seeking asylum in this country including a review of credible fear determinations by an immigration judge. The IIRIRA makes special provisions for increasing the training of INS officers who will be handling asylum cases. It also increases the administrative scrutiny of cases involving illegal immigrants claiming asylum as a defense to their removal as opposed to the typical removal procedure.

Whether or not an inadmissible alien enjoys constitutional protection under the Fifth Amendment is a question, according to Justice Marshall,¹⁸⁹ yet to be decided by the Supreme Court. However, since 1889, the Supreme Court has recognized, albeit in dictum, that excludable aliens are limited to whatever due process that Congress may set forth in legislation.¹⁹⁰ The IIRIRA is such legislation. Justice Marshall's dissent in *Jean* raises some valid points and illustrates the legal arguments opponents of the new legislation could raise. But as Justice Marshall rooted his analysis of the law in logic, perhaps the more proper position that should be adopted is reflected in a rather famous quote from Justice Oliver Wendell Holmes: "The life of the law has not been logic: it has been experience."¹⁹¹ Justice Holmes explained that, "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."¹⁹²

The removal of undocumented aliens found in this country who have not been admitted to the United States is a method of managing nomadic citizens of other countries. The Court's historical view that matters of international relations are under the complete control of Congress would indicate that Congress' exercise of that power, to wit, the IIRIRA's provisions denying judicial review of inadmissible aliens should be left untouched

188. *Final Anti-Terrorism Bill Contains Major Immigration Changes*, 73 INTERPRETER RELEASES 517, 523 (1996).

189. *Jean*, 472 U.S. at 858 (Marshall, J., dissenting).

190. *Id.* at 865.

191. OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

192. *Id.*

by the judiciary. Furthermore, the individuals who are affected by the new legislation are not citizens of the United States, therefore the resolution they seek (i.e., admission to the United States) is not grounded in any claim of right, but is a privilege granted by Congress. Accordingly, the denial of the privilege to be admitted to the United States, which rests solely under the control of Congress, does not fasten to it any guarantees of procedural due process that the courts could review. Perhaps for the opponents of the IIRIRA, the new law is an overreaching attempt at correcting the immigration problems of this country. Nevertheless, endless discussion regarding what should be done to correct a problem does little to resolve the matter at hand. The IIRIRA is a comprehensive piece of legislation that includes reasonable internal checks on the law's administration. Yet most important of all, the IIRIRA is an affirmative attempt at remedying a problem in this country that burdens every citizen of the United States—illegal immigration.

Paul S. Jones

The Tangled Web We Weave: The Internet and Standing Under the Fourth Amendment

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I. INTRODUCTION

"On each landing, opposite the lift shaft, the poster with the enormous face gazed from the wall. It was one of those pictures which are so contrived that the eyes follow you about when you move. BIG BROTHER IS WATCHING YOU, the caption beneath it ran."¹

1. GEORGE ORWELL, 1984 at 5 (NAL Penguin Inc. 1961).

GEORGE ORWELL was the pen name of an Englishman named Eric Blair. He was born in Bengal in 1903, educated at Eton, and after service with the Indian Imperial Police in Burma, returned to Europe to earn his living writing novels and essays. He was essentially a political writer who wrote of his own times, a man of intense feelings and fierce hates. He hated totalitarianism, and served in the

As we approach the twenty-first century, the Orwellian visions depicted in *1984* seep into our collective consciousness. Has Orwell's nightmare become today's reality? Some would argue that it has.²

The increased use of computers, coupled with the advent of cyberspace and the Internet, catapults the criminal defense attorney into a legal arena undreamed of a short time ago. Various sorts of crimes can occur in cyberspace,³ and as such, criminal procedure issues arising under the Fourth Amendment lurk in the background.

The Fourth Amendment ensures that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"⁴ If law enforcement officials violate one's Fourth Amendment rights in the process of searching or seizing evidence, the defendant can move to suppress the evidence.⁵ However, in order to assert one's Fourth Amendment rights and exclude evidence, the defendant must have *standing*.⁶

Loyalist forces in the Spanish Civil War. He was critical of communism but considered himself a Socialist. He hated intellectuals, although he was a literary critic. He hated *cant* and lying and cruelty in life and in literature. He died at forty-seven of a neglected lung ailment, leaving behind a substantial body of work, a growing reputation for greatness, and the conviction that modern man was inadequate to cope with the demands of his history.

Preface to GEORGE ORWELL, 1984 (NAL Penguin Inc. 1961) (emphasis added).

2. To connect with others who share the view that we presently exist in an Orwellian world, venture online and see, EPIC (visited Apr. 1, 1997) <<http://www.epic.org/privacy>>.

3. See discussion *infra* Part III.A.

4. U.S. CONST. amend. IV (emphasis added).

5. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 109, at 219 (1991). The notion that evidence illegally obtained can be suppressed at trial sprung from the celebrated case of *Boyd v. United States*, 116 U.S. 616 (1886). In *Boyd*, the Court decided that because the government's conduct circumvented the Fourth Amendment when officials forced a citizen to disclose certain incriminating papers, such evidence was inadmissible at trial against the defendant. *Id.* at 631-32 The use of general warrants and writs of assistance, devices employed by agents of the crown in England to rifle through homes of its citizens in an effort to search for evidence, weighed heavily on the minds of the nine justices in *Boyd*. See generally *id.* Accordingly, the development of the exclusionary rule began. See discussion *infra* Part II (providing further analysis of the exclusionary rule and its application to the standing doctrine). See also *Mapp v. Ohio*, 367 U.S. 643 (1961); *Rochin v. California*, 342 U.S. 165 (1952); *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled sub nom.* *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914), *overruled sub nom.* *Mapp v. Ohio*, 367 U.S. 643 (1961). The aforementioned cases outline the chronological development of the exclusionary rule.

6. DRESSLER, *supra* note 5, §109, at 219. See also discussion *infra* Part II.A.-E.

For purposes of determining whether a defendant may challenge the unconstitutionality of a search and seizure, standing is a threshold question.⁷ This note will focus on what constitutes standing for a motion to suppress evidence searched and/or seized in cyberspace. First, the evolution of standing jurisprudence will be discussed. Second, the federal wiretapping statutes will be examined to determine whether they can shed light on this issue. Third, as there are no cases directly on point which focus on standing under the Fourth Amendment and the Internet, two fictional characters, whom you will meet shortly, will take us on various hypothetical journeys through cyberspace and Fourth Amendment analysis.⁸

II. WHAT IS STANDING?

When a defendant challenges the admission of evidence in a criminal case on the premise that it was secured in violation of her Fourth Amendment rights, she must be a party entitled to do so.⁹ If the defendant is so entitled, then she has “standing” to move to suppress the evidence *vis-à-vis* the exclusionary rule.¹⁰ The exclusionary rule usually provides that when evidence is unconstitutionally attained, it is inadmissible in criminal proceedings against the person whose rights were violated.¹¹ This brings us to

7. See discussion *infra* Part II.B (explaining *Jones*, *Rakas*, their progeny, and the Court’s current stance on standing jurisprudence as a starting point for analysis under the Fourth Amendment).

8. Intriguing criminal cases may flow from the recent Heaven’s Gate cult mass suicide. Aside from the cult members’ plans to board the mothership they believed to be trailing the Hale-Bopp Comet, a central feature of this peculiar cult was its web site, the “Heavens Gate.” (The web site no longer exists.) Will the Heaven’s Gate web site prompt legal discussion concerning the Internet and the Fourth Amendment? For interesting discussions concerning the impact of the cult’s activity on the Internet, see Robert J. Hawkins & Matt Miller, *Cult Suicide in Rancho Sante Fe: Mass Suicide News Circles the World at Net Speed*, SAN DIEGO UNION & TRIB., Apr. 1, 1997, at 12 (Computer Link Section); Sandi Dolbee, *Cult Suicide in Rancho Sante Fe: 18-year-old Recounts His Internet Visit with Cultist Sandi Dolbee*, SAN DIEGO UNION & TRIB., Mar. 30, 1997, at A1; and James Lileks, *Cult Suicide in Rancho Sante Fe: Death Cult Fantasy Disguised as Religion Drove Heaven’s Gate Cultists to Delusion, and Ultimately to Self-Destruction; ‘New Age’ Indulgence Led Odd People to Bizarre End*, SAN DIEGO UNION & TRIB., Apr. 1, 1997, at G1.

9. WAYNE R. LAFAYE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 9.1, at 459–60 (1992).

10. DRESSLER, *supra* note 5, at 219.

11. *Id.* at 235. However, if police officers, in good faith, reasonably rely on what is later determined to be an invalid warrant, the evidence may be used against the defendant at his or her trial. See *United States v. Leon*, 468 U.S. 897 (1984). *Leon* firmly established the “good faith” exception to the exclusionary rule. See DRESSLER, *supra* note 5, at 249–50. See also *United States v. Haven*, 446 U.S. 620 (1980); *Harris v. New York*, 401 U.S. 222 (1971);

the central issue: When does the defendant have standing; in other words, when is one entitled to challenge the admission of evidence on grounds that the search and seizure contravened the Fourth Amendment?

A. *Katz v. United States*

The linchpin for standing, and Fourth Amendment examination in general, hinges on *Katz v. United States*.¹² When Charles Katz called in his wagers from a public telephone booth in Los Angeles, BIG BROTHER was listening. Without a warrant, FBI agents surreptitiously attached electronic listening and recording devices to the *outside* portion of the booth where Mr. Katz placed his calls.¹³

Prior to the *Katz* decision, Fourth Amendment jurisprudence encompassed the rationale that physical penetration or trespass into a "constitutionally protected area" was necessary for governmental conduct to rise to the level of a violation under the Fourth Amendment.¹⁴ The logical implication of this standard translated into a legal principle which espoused a property based model for determining whether a defendant had standing.¹⁵ Thus, before *Katz*, standing was invariably entwined with the Court's property based approach to Fourth Amendment jurisprudence.¹⁶

It therefore came as no surprise that the government in *Katz* argued no search occurred because there was no physical trespass into the phone booth

Walder v. United States, 347 U.S. 62 (1954); Agnello v. United States, 269 U.S. 20 (1925). These cases discuss the chronological development of the exception to the exclusionary rule for purposes of impeaching a defendant's credibility. See also *Nix v. Williams*, 467 U.S. 431 (1984) (explaining the inevitable discovery exception to the exclusionary rule which states that evidence which would otherwise be inadmissible because of an unconstitutional search or seizure transforms into admissible evidence if in the final analysis, the evidence would have been lawfully discovered independent of the initial bad search or seizure).

12. 389 U.S. 347 (1967).

13. *Id.* at 348-49. The physical location of the listening device, the outside portion of the phone booth, is meaningful in that the Court's Fourth Amendment philosophy, up to this point in history, hinged on whether there was physical penetration into a "constitutionally protected area." If the Court adhered to its prior rationale, there could not be a Fourth Amendment violation in *Katz* because the listening device did not actually penetrate any of the four walls of the phone booth.

14. *Olmstead v. United States*, 277 U.S. 438 (1928). In *Olmstead*, government agents intercepted the defendant's phone conversations without any physical trespass into the defendant's home. The Court deduced that without a physical trespass, no search of a place could have occurred under the rubric of the Fourth Amendment. *Id.* at 466.

15. WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3, at 118 (1996).

16. DRESSLER, *supra* note 5, at 56.

where Mr. Katz called in his bets.¹⁷ Katz was convicted, and the district court, as well as the court of appeals, agreed on admitting the tape recorded evidence.¹⁸ Both lower courts relied on the logic of *Olmstead v. United States* and its progeny, ruling that no violation occurred because there was no physical invasion of the phone booth where Mr. Katz placed his calls.¹⁹

Justice Stewart, writing for the majority, rejected the trespass rationale stemming from *Olmstead*, stating the now oft-quoted phrase that “the Fourth Amendment protects people, not places.”²⁰ His opinion, read together with Justice Harlan’s concurring opinion, formed the crux for future Fourth Amendment jurisprudence.²¹ Standing would no longer be contingent upon whether there was a physical intrusion into the area being searched. Justice Harlan’s concurrence advocated a two prong test: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”²² While the subjective prong is no longer critical to the overall calculus for determining whether one has standing, both prongs still must be satisfied.²³ In fact, some contend that “inquiry into the particular defendant’s subjective state of mind has *no* place in the application of the *Katz* expectation of privacy standard.”²⁴ The focus of the objective prong examines what types of self-protective steps were taken by the individual to ensure that his or her activities would remain private.²⁵ Were those self-protective steps *sufficient* to justify a reasonable person in believing that his or her activity would be free from uninvited eyes or ears? One who knowingly exposes her activities to the public or acts in plain view, cannot be said to have a reasonable expectation of privacy.²⁶ In the same vein, the Fourth Amendment does not protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides information will not reveal it to the government.²⁷

17. *Katz*, 389 U.S. at 352.

18. *Katz v. United States*, 369 F.2d 130, 134 (9th Cir.), 389 U.S. 347 (1967).

19. *Id.* at 133.

20. *Katz*, 389 U.S. at 351. Individual privacy (it was thought), not the arbitrary location of a listening device, would be the detrimental factor for Fourth Amendment jurisprudence. See also LAFAYE & ISRAEL, *supra* note 9, at 248.

21. DRESSLER, *supra* note 5, at 58–59.

22. *Katz*, 398 U.S. at 361 (Harlan, J., concurring).

23. DRESSLER, *supra* note 5, at 60.

24. LAFAYE, *supra* note 15, § 11.3(c), at 157.

25. DRESSLER, *supra* note 5, at 63.

26. *Katz*, 389 U.S. at 351.

27. *Hoffa v. United States*, 385 U.S. 293, 302 (1967). Although *Hoffa* was not grounded precisely on the standing issue, its logic is certainly relevant to the overall calculus as to whether one has a reasonable expectation of privacy. This is because “the Fourth Amendment

Applying this test to the facts in *Katz*, we can easily see why the FBI surveillance constituted a search. First, Katz must have had an actual expectation of privacy when he placed the call in the phone booth. Katz did not know the phone booth was being monitored by the FBI; therefore, when he picked up the phone, he had an actual expectation of privacy. Second, Katz stepped into the phone booth and shut the door behind him before placing his calls. He took adequate self-protective steps. Justice Stewart points out that he did this to exclude the "uninvited ear."²⁸ "One who occupies it [the phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."²⁹

Despite abandoning the trespass rationale grounded in *Olmstead*, the Court will sometimes utilize property concepts for purposes of standing analysis.³⁰ However, the Court is often weary of a property-based approach to standing and prefers to tailor its reasoning to the *Katz* expectation of privacy test.³¹ Nevertheless, the property-based rationale can be reconciled with the approach *Katz* takes.³²

The fundamental inquiry regarding standing to object to a search is that articulated in [*Katz* and] *Mancusi*: whether the conduct which the defendant wants to put in issue involved an intrusion into *his* reasonable expectation of privacy. In resolving that question, it is useful to consider the factors which the Court has on other occasions alluded to—whether the defendant had an interest in the place searched, whether he had an interest in the items seized, and

[does not] protect[] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. This simple but crucial line of reasoning will play an important role in the system operator/user relationship on the Internet for purposes of determining whether the user has standing to object to evidence obtained in cyberspace. See discussion *infra* Parts IV.A.–F.

28. *Katz*, 389 U.S. at 352.

29. *Id.*

30. LAFAVE, *supra* note 15, § 11.3, at 118. "[S]tanding may be acquired by having a 'proprietary or possessory interest in the premises' which were searched . . ." *Id.* (quoting *Brown v. United States*, 411 U.S. 223, 229 (1973)).

31. See *Mancusi v. DeForte*, 392 U.S. 364 (1968). The Court held that the "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Id.* at 368.

32. LAFAVE, *supra* note 15, § 11.3, at 119.

whether the search occurred at a place where he was lawfully present.³³

Thus, while physical trespass is not dispositive on the issue of standing, the utilization of property concepts will aid in the determination of whether a particular defendant has standing.

B. Jones, Rakas, and Their Progeny

*Rakas v. Illinois*³⁴ is considered the leading modern Supreme Court case for standing under the Fourth Amendment.³⁵ In *Rakas*, police officers pulled over an automobile which matched the description of a vehicle used in a robbery.³⁶ They searched the car and found evidence of the robbery, including a sawed-off shotgun underneath the front passenger seat and rifle shells in a locked glove compartment.³⁷ The defendant, a passenger, moved to exclude the evidence on grounds that the search violated his Fourth Amendment rights.³⁸ Relying on the Court's 1960 decision in *Jones v. United States*,³⁹ the defendant contended he had standing to contest the search because he was "'legitimately on [the] premises'" when the police examined the car.⁴⁰

In *Jones*, the defendant, a guest at another's apartment, was present when police searched the apartment and found contraband.⁴¹ The defendant testified that the apartment belonged to a friend who had given him a key and permission to use the apartment.⁴² Under its interpretation of Rule 41(e) of the *Federal Rules of Criminal Procedure*,⁴³ the Court announced that

33. *Id.* (footnote omitted).

34. 439 U.S. 128 (1978).

35. DRESSLER, *supra* note 5, at 224.

36. 439 U.S. at 130.

37. *Id.*

38. *Id.*

39. 362 U.S. 257 (1960), *overruled sub nom.* *United States v. Salvucci*, 448 U.S. 83 (1980).

40. *Rakas*, 439 U.S. at 132 (alteration in original).

41. 362 U.S. at 259.

42. *Id.*

43. Rule 41 states:

(e) Motion for Return of Property. *A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and the use of*

"anyone legitimately on premises" at the time of the search qualified "as a 'person aggrieved by an unlawful search and seizure'"⁴⁴ and had standing to move to suppress the evidence.⁴⁵ Lower courts utilized this "legitimately on premises" rationale as a basis for determining whether a defendant had standing under the Fourth Amendment.⁴⁶

The Court dismissed that line of logic in *Rakas*,⁴⁷ and instead couched its language for standing in terms of the doctrine espoused in *Katz*: Does the individual have a "legitimate expectation of privacy in the invaded place?"⁴⁸ Justice Rehnquist, speaking for a 5-4 majority, conservatively construed the following rationale found in *Alderman v. United States*:⁴⁹ "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."⁵⁰

Despite retreating from the "legitimately on premises" rationale grounded in *Jones*, the Court upheld the lower court's holding through the

the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

FED. R. CRIM. P. 41(e) (emphasis added).

44. *Jones*, 362 U.S. at 261 (quoting FED. R. CRIM. P. 41(e)).

45. *Id.* at 267.

46. See *State v. Porter*, 324 N.E.2d 857 (Ind. Ct. App. 1975); *Commonwealth v. Tasco*, 323 A.2d 831 (Pa. Super. Ct. 1974); *State v. Simms*, 516 P.2d 1088 (Wash. Ct. App. 1973). These cases all hold that guests who were legitimately on premises have standing to challenge the admission of evidence to be used against them.

47. This will prove to be important because an Internet user who is at a website with the system operator's permission (legitimately on premises) may not automatically attain standing to challenge evidence searched and seized in cyberspace. See discussion *infra* Part IV.

48. *Rakas*, 439 U.S. at 143.

49. 394 U.S. 165 (1969). In *Alderman*, the Court crystallized the contention that Fourth Amendment rights are personal:

There is no necessity to exclude evidence against one defendant in order to protect the rights of another. . . . What petitioners appear to assert is an independent constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.

Id. at 174. This argument is vital to understanding the predicament of the online user and her relationship with the system operator. A user may not be able to assert a Fourth Amendment violation if only the system operator's rights are violated. See discussion *infra* parts IV.A.-F.

50. *Rakas*, 439 U.S. at 133-34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

use of the *Katz* framework⁵¹ and some crafty *post hoc* analysis. Thus, the Court did not directly overrule the “legitimately on premises” rationale in all cases. Rather, this factor should be considered in conjunction with a determination as to whether the particular defendant’s situation parallels the circumstances in *Jones*. The Court reasoned that *Rakas*, though legitimately on the premises (in the car), did not have a reasonable expectation of privacy similar to *Jones*. Unlike *Rakas*, *Jones* had a key to the apartment, clothes in the closet, and had previously slept on the premises.⁵² Those facts indicate complete dominion and control and the power to exclude others from the apartment.⁵³ “[D]ominion and control” and the power to exclude others are integral components of the objective prong to the *Katz* test.⁵⁴ The key *Jones* possessed, in addition to the clothes he stored in the apartment, were sufficient indicia of control to warrant an expectation of privacy that “society is prepared to recognize as ‘reasonable.’”⁵⁵ The Court also elucidated that because the right to exclude others invariably flows from the ownership or lawful possession of real or personal property, one who has such a possessory interest will probably have a legitimate expectation of privacy stemming from that right to exclude.⁵⁶

Unlike *Katz* and *Jones*, *Rakas* did not have any indicia of control.⁵⁷ *Katz* occupied the telephone booth, shut the door behind him to exclude all others, and paid the toll.⁵⁸ “Except with respect to his friend, *Jones* had complete dominion and control over the apartment and could exclude others from it.”⁵⁹ Here, *Rakas* simply could not prove he had a legitimate expectation of privacy as a mere passenger in an automobile contesting the search of

51. *Id.* at 141. Why did the Court retreat from the “legitimately on premises” rationale found in *Jones*?

[T]he holding in *Jones* can best be explained by the fact that *Jones* had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his “interest” in those premises might not have been a recognized property interest at common law.

Id. at 143.

52. *Id.* at 141.

53. *Id.* at 143–44 n.12.

54. *Rakas*, 439 U.S. at 149.

55. *Katz*, 389 U.S. at 361.

56. *Rakas*, 439 U.S. at 143–44 n.12.

57. Essentially, *Rakas* could not *legitimately* exclude others from the automobile because he did not have a possessory interest in it. See discussion *supra* notes 54–56 and accompanying text.

58. *Rakas*, 439 U.S. at 149.

59. *Id.*

contraband found under the seat and in a glove compartment.⁶⁰ Therefore, Rakas did not have standing to assert the illegality of the search in an attempt to suppress the evidence seized.⁶¹

Interwoven within standing analysis under the Fourth Amendment is the issue of whether a search has occurred. Because the Fourth Amendment only protects against unreasonable searches and seizures, it could not come into play with out a search. To determine whether government activity rises to the level of a search within the meaning of the Fourth Amendment, one must have a legitimate expectation of privacy in the area examined.⁶² Essentially, this is the same test used to determine whether a defendant has standing to challenge the admission of evidence. The basic similarity between the tests for standing and determining whether a search occurred led Justice Rehnquist to opine in *Rakas*: "The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."⁶³

Despite Justice Rehnquist's position, two years later, in *Rawlings v. Kentucky*,⁶⁴ Justice Blackmun contended:

[T]hat these two inquiries [standing and whether a substantive Fourth Amendment 'search' occurred] 'merge into one' in the sense that both are to be addressed under the principles of Fourth Amendment analysis developed in *Katz v. United States* and its progeny. But I do not read . . . *Rakas*[] as holding that it is improper for lower courts to treat these inquiries as distinct components of a Fourth Amendment claim.⁶⁵

60. *Id.* Arguably if Rakas has a key to the car, he would have had standing.

61. *Id.*

62. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

63. *Rakas*, 439 U.S. at 139 (footnote omitted).

64. 448 U.S. 98 (1980).

65. *Id.* at 112 (Blackmun J., concurring) (citations omitted). In *Rawlings*, the defendant was the unsuspecting guest at the house of one Marcuess who had the misfortune of being present when the police searched the Marcuess home without a warrant. Apparently, seconds before the police arrived, the defendant stuffed some 1,800 tablets of LSD and other drugs into another guest's (Vannessa Cox) purse. Although the defendant had a possessory interest in the contraband seized, the Court concluded that he did not have a legitimate expectation of privacy in Cox's purse. *Id.* at 105-06. Defendant could not exclude others from Cox's purse and had no dominion and control over it. *Id.* Thus, the defendant did not have standing. *Id.* One can foresee the applicability of *Rawlings* on the Internet. The fact that one might have a

Justice Blackmun pointed out that it is possible for a defendant to have standing but lose on the merits.⁶⁶ Conversely, one could win on the merits yet have no legitimate expectation of privacy for purposes of standing.⁶⁷ In the final analysis, however, if the defendant loses either the standing issue or on the merits, the evidence will be admissible. To successfully win a motion to suppress evidence, one must have standing *and* there must be a "search" under substantive Fourth Amendment analysis.⁶⁸

C. *Hotels, Motels, Tenants, and the Transfer of Property*

Does an individual have a reasonable expectation of privacy in a leasehold, hotel, or motel room when he or she is not there at the time of the government search?⁶⁹ At first blush, some might contend that because the hotel or motel manager has a possessory interest in the establishment, as well as the potential to access its rooms, one cannot have a reasonable expectation of privacy. Such an argument necessarily encompasses a rationale that the landlord or manager can validly consent to a government agent's request to search the tenant's or guest's premises. This sort of argument has been consistently rejected by courts facing the issue.

Courts have determined that those tenants,⁷⁰ hotel guests,⁷¹ and motel guests⁷² with a present possessory interest in the premises searched all have

possessory interest in one's electronic mail does not necessarily mean one will have standing. If one lacks dominion and control or the power to exclude others from their electronic mail, the possessory interest in it becomes irrelevant.

66. *Rawlings*, 448 U.S. at 105–06.

67. *Id.*

68. It is useful to examine cases stemming from both of these issues to assess their applicability to the Internet. See also *United States v. Salvucci*, 448 U.S. 83 (1980) (rejecting the automatic standing doctrine for possession offenses and developing the chronological analysis under the standing doctrine). *Salvucci* sheds light on *Rakas*. Interview with Professor Mark Dobson, Nova Southeastern University, Shepard Broad Law Center (Feb. 18, 1997).

69. Standing in these types of situations is important because some will contend that the relationship between a user and her system operator is the functional equivalent of the hotel guest and manager relationship. If these types of relationships are indeed analogs of each other, then the case for standing in cyberspace dramatically improves because hotel and motel guests typically have standing to assert the illegality of a search. See *infra* Part IV (providing additional discussion on this argument).

70. See, e.g., *Chapman v. United States*, 365 U.S. 610 (1961); *United States v. Ford*, 34 F.3d 992 (11th Cir. 1994). These cases stand for the proposition that one with a leasehold interest (as opposed to ownership) has standing to challenge a government search. Under a *Katz-Mancusi* analysis, a defendant would have a legitimate expectation of privacy for purposes of standing. See LAFAYE, *supra* note 15, § 11.3(a), at 122.

71. See, e.g., *Stoner v. California*, 376 U.S. 483 (1964); *State v. Jackson*, 210 N.W.2d 537 (Iowa 1973). Both cases hold that the consent of a hotel clerk obtained by police to search defendant's room was invalid. Under a *Katz-Mancusi* analysis, the defendant would

standing to challenge evidence obtained by the government.⁷³ Thus, managers and landlords may not always effectively consent to the search of their tenants rooms. For example, tenants and paying guests could *effectively* consent with their landlords or managers to allow the police to search their rooms. Such consent would obliterate the legitimate expectation of privacy necessary for standing.

D. Self-Protective Steps and Modern Technology

What constitutes a self-protective step that would rise to the level of a reasonable expectation of privacy? Technology has advanced to a point where activities once considered private are, for purposes of standing jurisprudence under the Fourth Amendment, "broadcast to the world."⁷⁴

In *Smith v. Maryland*,⁷⁵ the Court ruled that the defendant had no legitimate expectation of privacy in the phone numbers he dialed from his home.⁷⁶ Police used a device called a pen register to monitor the electrical impulses coming from the defendant's phone in order to compile a list of the numbers he called.⁷⁷ The Court applied *Katz* and determined that the defendant probably could not have an actual expectation of privacy in the phone numbers he dialed because he knowingly divulged that information to the telephone company.⁷⁸ Second, assuming *arguendo* one did have an actual expectation of privacy in the phone number she dialed, such an expectation could not be reasonable.⁷⁹ Following the line of logic in *Hoffa* and its progeny, one who voluntarily conveys information to a third party cannot have a reasonable expectation of privacy.⁸⁰ *Katz* was distinguished on the ground that pen registers do not disclose the contents of one's conversations, only the numbers dialed.⁸¹ Where one has a reasonable expectation of privacy in the contents of her conversation, she does not with

have a legitimate expectation of privacy for purposes of standing. See LAFAVE, *supra* note 15, § 11.3(a), at 122.

72. See, e.g., *United States v. Anderson*, 453 F.2d 174, 177-78 n.6 (9th Cir. 1971) (relying on *Jones* in order to deduce that a motel guest has standing). Utilizing the *Katz-Mancusi* analysis, a defendant in a motel room would have a legitimate expectation of privacy in such premises for purposes of standing. See LAFAVE, *supra* note 15, § 11.3(a), at 122.

73. See generally LAFAVE, *supra* note 15, § 11.3(a).

74. *Katz*, 389 U.S. at 352.

75. 442 U.S. 735 (1979).

76. *Id.* at 742.

77. *Id.* at 736 n.1.

78. *Id.* at 742.

79. *Id.* at 743.

80. *Smith*, 442 U.S. at 743-44.

81. *Id.* at 741.

the numbers she dialed.⁸² The phone company must track the phone numbers dialed for purposes of billing.⁸³ A phone company does not have a similar need for the contents of the user's communications.⁸⁴ Therefore, a defendant like Smith will not have standing to assert the illegality of a search for phone numbers dialed.

The use of beepers to track a suspect's movements is not considered a search under constitutional analysis if the information it communicates is available to the general public, or if such information could be gathered from an area where one is legally entitled to watch.⁸⁵ If information is secured through the use of a beeper from an area not within the public's view, then such activity is considered a search under the Fourth Amendment.⁸⁶

In *Dow Chemical Co. v. United States*,⁸⁷ the Court held that no search occurred when the government engaged in aerial photography to secure pictures of an industrial complex.⁸⁸ Although Dow Chemical Company constructed walls around their complex preventing ground-level view,⁸⁹ such self-protective steps were not legally sufficient.⁹⁰ Because the plane's surveillance occurred from public navigable airspace and was not physically intrusive, the self-protective steps taken by Dow were rendered meaningless because they did not cloak what could be seen from above.⁹¹ The Court noted in dictum that the use of "highly sophisticated surveillance not generally available to the public, such as satellite technology,"⁹² might constitute a search under the Fourth Amendment.

The dissent pointed out the fallacious logic in the majority opinion: How could the \$22,000, precision aerial mapping camera the government used be considered readily available to the public?⁹³ Who would purchase such a device? From *Dow Chemical*, it would seem that if sense-enhancing technology is available (like a precision aerial mapping camera), then the use of it can not be considered a search. However, the use of sense-creation devices (like satellite technology) probably would constitute a search under

82. *Id.*

83. *Id.* at 744.

84. *Id.*

85. *United States v. Knotts*, 460 U.S. 276 (1983).

86. *Id.*

87. 476 U.S. 227 (1986).

88. *Id.* at 239.

89. *Id.* at 229.

90. *Id.* at 239.

91. *Id.* at 238-39.

92. *Dow Chemical*, 476 U.S. at 238.

93. *Id.* at 251 n.13 (Powell, J., dissenting).

the Fourth Amendment. What one knowingly exposes to the public must be done at one's peril. If BIG BROTHER can potentially watch from a public view, he can legally watch.

One other case of note, *California v. Greenwood*,⁹⁴ holds that one cannot have a reasonable expectation of privacy in the contents of her garbage left at the side of the curb.⁹⁵ The Court cited to both *Katz* and *Smith*, reasoning that garbage is knowingly exposed to the public and voluntarily turned over to a third party (the garbage collector).⁹⁶ The crux of *Greenwood* in reality went further than *Katz* and *Smith*. Greenwood only knowingly exposed opaque garbage bags to the public, *not* the contents inside the bag. The majority worked around this obstacle by reasoning that "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."⁹⁷ Thus, one cannot have a reasonable expectation of privacy in the garbage he discards at curbside. The Court "emphasized instead that the Fourth Amendment analysis must turn on such factors as 'our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion.'"⁹⁸

The Court also reasoned that a California law declaring the search of trash illegal, and providing for use of the exclusionary rule as a means of remedying such illegality, does not allow an individual's expectation of privacy to rise to the level of a "reasonable" one under the Fourth Amendment.⁹⁹ State law does not define whether one has a reasonable expectation of privacy.¹⁰⁰ Similarly, in a case where police broke the law and trespassed on the defendant's property to search for marijuana, despite "no trespassing" signs, the Court held that one could not have a legitimate expectation of privacy because the area invaded was an open field.¹⁰¹

94. 486 U.S. 35 (1988).

95. *Id.* at 41.

96. *Id.* at 40.

97. *Id.* (footnotes omitted) (citation omitted). The garbage ultimately goes to the dump where people, along with thousands of vultures, can view and peck at the contents of everyone's rubbish. Say au revoir to any reasonable expectation of privacy!

98. *Id.* at 43. (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)). The Court now seems to be injecting society's common knowledge and understanding into the calculus of what constitutes a legitimate expectation of privacy.

99. *Greenwood*, 486 U.S. at 43.

100. *Id.*

101. *Oliver v. United States*, 466 U.S. 170 (1984).

E. *Flaws in the Federal Wiretapping Statutes*

In 1986, Congress revamped federal wiretapping statutes to include the prohibition on the interception of electronic communications.¹⁰² Commonly known as the Electronic Communications Privacy Act ("ECPA"),¹⁰³ this statute purports to govern the procedures for obtaining information online. As with many statutes, the ECPA is riddled with exceptions.¹⁰⁴

Section 2510(12) defines an "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system."¹⁰⁵ Although the ECPA prohibits the interception and disclosure of wire, oral, or electronic communications,¹⁰⁶ it permits any person "to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public."¹⁰⁷ This language encompasses the rationale in *Katz* and authorizes the interception of those electronic communications knowingly exposed to the public.

The ECPA also carves out an exception permitting one to disclose the contents of electronic communications "which were inadvertently obtained by the service provider and which appear to pertain to the commission of a

102. LANCE ROSE, *NETLAW: YOUR RIGHTS IN THE ONLINE WORLD* 167 (1995) [hereinafter *NETLAW*].

103. 18 U.S.C. § 2510 (1994).

104. It should also be noted that there are no cases which apply the ECPA to a situation involving the interception of communications in cyberspace.

105. 18 U.S.C. § 2510(12). Not included in the definition of an electronic communication is a wire or oral communication. *See id.* § 2510(12)(A).

"[W]ire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of . . . communications

Id. § 2510(1). "[O]ral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." *Id.* § 2510(2). These definitions will prove to be important because the ECPA only authorizes the suppression of evidence when oral and wire communications are intercepted.

106. *Id.* § 2511 (1994).

107. 18 U.S.C. § 2511(2)(g)(i).

crime, if such divulgence is made to a law enforcement agency.”¹⁰⁸ Thus, if the service provider “inadvertently” stumbles across some evidence tending to incriminate her user, she may divulge the contents of the user’s communications to the police. The crux of the ECPA, as it pertains to the prohibition on divulging the contents of an electronic communication, is found in section 2511(3)(a) which states that

a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) *while in transmission* on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.¹⁰⁹

The words “while in transmission” are crucial to understanding the ECPA. Because the ECPA only protects against the divulging of communications “while in transmission,” it is logical to deduce that stored messages are beyond the reach of the statute.

[T]he ECPA does not give online system users an automatic right of privacy from system operators for stored messages. Since a system can easily be configured to store all messages that pass through it, the ability to review stored messages effectively gives the operator the ability to review all messages passing through the system.¹¹⁰

Of course, a provider of an electronic communication service may divulge the contents of electronic communications if he or she has been provided with “a court order directing such assistance signed by the authorizing judge.”¹¹¹ A properly executed warrant authorizes the service provider to assist law enforcement officials in intercepting electronic communications.

Assuming *arguendo* the electronic communication is “in transmission” within the meaning of section 2511(3)(a), it remains unclear whether one will be able to remedy the interception of such communications through a

108. *Id.* § 2511(3)(b)(iv).

109. *Id.* § 2511(3)(a) (emphasis added).

110. NETLAW, *supra* note 102, at 168. The ECPA would prohibit the interception and disclosure of electronic messages sent in live or real-time transmission. *Id.*

111. 18 U.S.C. § 2511(2)(a)(ii)(A).

motion to suppress evidence. Section 2515¹¹² only prohibits the use of evidence of intercepted wire or oral communications.¹¹³ This section does not mention an “electronic communication” as a type of communication which would require the prohibition of its use as evidence.¹¹⁴ The canon *expressio unius est exclusio alterius* leads one to conclude that because the drafters of the ECPA specifically mentioned the words “wire” and “oral communications” in section 2515, the words “electronic communications” must have been intentionally omitted since such words would have been included if that was what the legislature had intended.¹¹⁵ The ECPA seemingly affords the greatest amount of privacy protection for aural transmissions¹¹⁶ (a type of transmission not encompassed in the definition of “electronic communications”). The only remedy mentioned for an unauthorized interception or disclosure of an electronic communication is a civil cause of action under section 2520.¹¹⁷

It would seem as though the ECPA, like many laws, has loopholes which would curtail a user’s privacy for purposes of standing under the Fourth Amendment. The issue of whether a particular defendant has standing to initiate a motion to suppress evidence will most likely have to be

112. 18 U.S.C. § 2515 (1994).

113. Section 2515, entitled “Prohibition of use as evidence intercepted wire or oral communications,” states:

Whenever any *wire* or *oral* communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Id. (emphasis added).

114. *See id.*

115. The following canon should play a significant role in the interpretation of § 2515: “Technical and legal words with special meanings are construed according to the technical, legal, or special meaning appropriate to the context of the statute.” JACK DAVIES, *LEGISLATIVE LAW AND PROCESS IN A NUTSHELL* 311 (1986). This canon further buttresses the argument that the drafters intended “electronic communications” to be omitted from the scope of § 2515. Accordingly, the meanings of the words electronic, oral, and wire communications, which are “technical and legal words,” should be treated the same throughout the ECPA. The words are “technical” in the sense that they deal with highly particularized modes of communication. They are “legal” because they must be construed within the meaning of a law, the ECPA. Simply put, the ECPA does not explicitly, or even implicitly, authorize the suppression of an electronic communication.

116. NETLAW, *supra* note 102, at 168.

117. *See generally* 18 U.S.C. § 2520 (1994).

resolved by resorting to the seminal Fourth Amendment cases discussed above.¹¹⁸

III. CYBERSPACE

Cyberspace is a globally networked, computer-sustained, computer-accessed, and computer-generated, multi-dimensional, artificial, or "virtual" reality. In this world, on which every computer screen is a window, actual, geographic distance is irrelevant. Objects seen or heard are neither physical nor, necessarily, presentations of physical objects, but are rather—in form, character, and action—made up of data, pure information. This information is derived in part from the operation of the natural, physical world, but is derived primarily from the immense traffic of symbolic information, images, sounds, and people, that constitute human enterprise in science, art, business, and culture.¹¹⁹

Because there are so many different methods of accessing cyberspace, various legal theories will apply to different factual scenarios. This note will focus only on the potential legal pitfalls in the "public system" which provides access to the general public as a whole. Such a system typically includes a storage area in cyberspace where one can access his or her own data and prevent others from retrieving it (through the use of a password). Additionally, there are areas where all have access to the same information.

A system operator (also referred to as a "sysop") is one who heads the particular online system. System operators who run these systems have the ability to access one's "private" files but may or may not choose to do so.¹²⁰ Within the web of "public" cyberspace, there might also be some systems existing which provide users limited access. In order to gain access to such a system, a user might have to pay a fee or obtain approval from the system operator who runs it.

A. *Online Crime and Evidence of Crime Online*

New societal conventions seem to go hand in hand with new forms of crime. Even those who have never gone online know about the problems

118. See also Megan Connor Bertron, Note, *Home Is Where Your Modem Is: An Appropriate Application of Search and Seizure Law to Electronic Mail*, 34 AM. CRIM. L. REV. 163 (1996).

119. M. ETHAN KATSH, LAW IN A DIGITAL WORLD 29 (1995).

120. See generally NETLAW, *supra* note 102; see also *supra* notes 108–17 and accompanying text.

with hackers in cyberspace.¹²¹ The word “hacker” was not in existence until computers linked up with telecommunications.

Aside from hacking, various forms of computer crime now exist. Criminals upload viruses in an attempt to destroy computer systems, steal copyrighted material, and engage in the exchange of child pornography amongst other things.¹²² Private files exist which contain evidence of crime occurring outside cyberspace (the dreaded physical world).¹²³ If police “search” cyberspace, the question of standing to assert the illegality of government conduct becomes pertinent.

B. *Meet Stoney and Talley*¹²⁴

In order to better understand how standing under the Fourth Amendment works in conjunction with cyberspace, we will follow the exploits of two fictional characters named Stoney and Talley. Stoney and Talley are your stereotypical cyber-nerds who have a knack of getting into trouble while surfing the net.

IV. SIX HYPOTHETICALS

A. *The “Public” Chat Room*

The Dean of Admissions at the newly-established Cyber Law Center would ultimately regret rejecting Stoney and Talley to the class of 2000. Upon receiving their e-mail rejections from the Cyber Law Center, Stoney and Talley decided to discuss their options at the “Worms R’ Us” site on the web where all the expert hackers did their business.

Both entered the site from their computers at home and joined Public Chat Room No. 3—a forum for disgruntled law school rejects. No password or fee was required to join Public Chat Room No. 3. “All are Welcome” blinked across the screen as they logged in. The top of the screen indicated 29 users who were currently in the room. Stoney and Talley bragged to all who would listen about their detailed plot to upload a destructive worm into the Cyber Law Center.

121. *Id.* at 141.

122. *Id.* at 187–208.

123. *Id.*

124. Professor Johnny C. Burris of Nova Southeastern University, Shepard Broad Law Center created these names for a hypothetical problem he distributed to his Criminal Procedure class in the Summer of 1995.

What Stoney and Talley couldn't know was that Officer Iago McFadden, a veteran of the Cleveland Police force, was masquerading online as Earthworm Jim, a supposed world-famous hacker. Warrantless online eavesdropping had become second nature to McFadden after the Cleveland brass moved him behind a desk and off the streets of Ohio. McFadden downloaded the incriminating conversations to his computer and later arrested Stoney and Talley for attempted computer tampering. At a pre-trial conference, Stoney and Talley moved to suppress the evidence on grounds that McFadden's search violated their Fourth Amendment rights.

Would Stoney and Talley have standing to assert the illegality of Officer McFadden's search? Clearly they would not. Under *Katz*, neither could have an actual (subjective) expectation of privacy in the contents of their communications because Public Chat Room No. 3 was open to the public. They both had to know that anyone online could see what they were saying. Assuming *arguendo* they did have an actual expectation of privacy, they could not have standing under the objective prong of the *Katz* analysis. Stoney and Talley knowingly exposed their conversation to the public. They took no self-protective steps to ensure privacy, and had no indicia of control to exclude others from the room. Furthermore, *Hoffa* tells us that the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides information will not reveal it to the government.¹²⁵ Thus, it would appear that any expectation of privacy they might have had would not be one which society would recognize as reasonable. The ECPA is in accordance with such analysis as it provides for the lawful interception of those electronic communications which are readily available to the public.¹²⁶ Inherent within the concept of a public chat room is the principle that everyone can see what everyone else is saying. It is therefore impossible to have a legitimate expectation of privacy in public chat rooms.

B. *The "Private" Chat Room*

Same scenario as before, except this time: *Stoney and Talley decide to discuss their plot to destroy the Cyber Law Center in "The Worm Hole" a "private"*¹²⁷ *chat room and sub-cite of "Worms R' Us." Other users are excluded from this area and may only view communications posted in the public chat room. Only the "Worms R' Us" system operator can view messages being transferred in private chat rooms like "The Worm Hole."*

125. *Hoffa*, 385 U.S. at 302.

126. See 18 U.S.C. § 2511(2)(g)(i).

127. It was "private" in the sense that the word "private" blinked across the top of their screens.

Sysop Slug, the system operator for "Worms R' Us," configured her system to store all messages passed online in both the public and private chat rooms. It is common knowledge that system operators can view messages stored in the computer and are capable of viewing live chat room discussions as well.

Hot on the trail of Stoney and Talley and tired of his desk job, Eagle-Eye McFadden takes to the streets and proceeds to (without a warrant) shakedown Sysop Slug for any information she might have on the two notorious hackers he'd been following. Reluctantly, Sysop Slug turns over the information. Stoney and Talley are arrested and they move to suppress the evidence McFadden gathered.

A few wrinkles develop in the previous hypothetical. First, when Stoney and Talley entered into "The Worm Hole," their case for an actual (subjective) expectation of privacy becomes more plausible if they really thought it was a "private" chat room. If both offer solid proof that they thought their communications would not be read by anyone, including Sysop Slug or eavesdropping hackers and users, it would be tough to overcome their assertion of a subjective expectation of privacy. Standing in this instance will (as it almost invariably does) turn on whether Stoney and Talley had a *legitimate* expectation of privacy. Stoney and Talley will contend that stepping into the "private" room constituted a self-protective step sufficient to rise to the level of a reasonable expectation of privacy. By doing so, they had dominion and control of their online conversation and had the power to exclude others from viewing it.

A cursory inspection of the former argument might seem persuasive. In fact, the *Katz* Court might have found a reasonable expectation of privacy. Under the logic of *Greenwood* and *Oliver*, however, it is generally understood by society that system operators have access to monitor all areas within their control and are truly considered the biggest threat to online privacy.¹²⁸ System operators fear potential raids by government agents chasing cyber-criminals.¹²⁹ This fear prompts many system operators to "reduce or eliminate user privacy on the system."¹³⁰

Assuming *arguendo* this sort of societal understanding is empirically true, one cannot have a legitimate expectation of privacy in a "private" chat room under the logic of *Greenwood* and *Oliver*. If the possibility of snoops rummaging through our garbage does not create a legitimate expectation of privacy based on our common knowledge, it requires a simple extension of

128. NETLAW, *supra* note 102, at 166.

129. *Id.*

130. *Id.*

the *Greenwood* holding to argue that a sysop's control of users' data renders an expectation of privacy illegitimate even in a "private" chat room when society recognizes the existence of this type of sysop control.

Under the logic of the ECPA, because Sysop Slug configured her system to automatically store messages, the interception and disclosure of the contents of the electronic communications would fall beyond the peripheral protection of the ECPA since the ECPA only covers the interception of communications "while in transmission." One must also consider the bite of section 2515. According to that section, electronic communications cannot be suppressed.¹³¹ Thus, Sysop Slug's disclosure to Eagle Eye would be authorized under the ECPA.

Greenwood would also seem to allow the admission of evidence surreptitiously retrieved from deleted files or messages once found in a "private" chat room. Hackers would become the cyber-analog for the scavengers and snoops. The deletion of a message or a file would serve as the functional equivalent to taking out the garbage. If the government visited a site and undeleted a file, the "owner" of that file could not have a legitimate expectation of privacy in it under the analysis of *Greenwood*.

Under the combined analysis of *Katz* and *Hoffa*, Stoney and Talley's conversation would probably be treated as if they voluntarily disclosed information to a third party because of the societal understanding concerning sysop control. The system operator could not be considered the functional equivalent of the telephone operator depicted in *Katz*. Whereas society understands that Ma Bell will not listen in on our phone conversations, the same cannot be said about system operators. Because of the growing fear amongst system operators concerning government raids, they have eliminated or severely curtailed user privacy.¹³² Ergo, the telephone and system operators are not the clear analogs one might think they are. This leads us to an unsavory sort of conclusion: police could illegally search and seize the system operator's stored data and use it against the system operator's users—not the system operator herself. Such reasoning would be in tune with the idea that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."¹³³ Stoney and Talley are not the "victims" of the illegal search, Sysop Slug (under Fourth Amendment jurisprudence) is the only real victim.

Even laws which curb the system operator's ability to monitor a user's communications would not, under the logic of *Greenwood* and *Oliver*, bear

131. See discussion *supra* Part II.E.

132. *Id.*

133. *Rakas*, 439 U.S. at 133–134.

on whether one has a reasonable expectation of privacy for purposes of standing jurisprudence under the Fourth Amendment.¹³⁴ Although the ECPA provides for civil remedies under section 2520 for certain system operator conduct which violates a user's privacy, *Greenwood's* rationale would seem to lend credence to the argument that the ECPA could not provide an individual with the legitimate expectation of privacy needed for standing. In cyberspace this argument becomes even stronger upon analogizing from *Greenwood*. The Court in *Greenwood* found that a state statute provided for the use of the exclusionary rule when police illegally searched garbage.¹³⁵ In the case of cyberspace and system operators, we are only dealing with a statute which provides for civil remedies when the proscribed conduct arises.¹³⁶ Further, the use of the exclusionary rule does not seem to apply to electronic communications under the section 2515 and the basic canon of *expressio unius*.¹³⁷ If the statute in *Greenwood* would not provide a basis for a legitimate expectation of privacy, a statute which dealt specifically with the exclusion of evidence, then it is a small step in logic to argue that the civil remedies set forth in section 2520 will not be sufficient insofar as one's reasonable expectation of privacy is concerned. This argument is buttressed by the fact that the exclusion of "electronic communications" is not provided for in section 2515.

C. Electronic Mail

Stoney and Talley, now in separate jail cells awaiting trial, suffer extreme withdrawal symptoms as they are without their portable laptops and each other. Luckily for them, the kind-hearted and dim-witted Nurse Hatchet takes pity on the two inmates and buys them both portable laptops equipped with cellular modems.

Behind steel bars and beneath prison issued blankets, electronic illuminance brings smiles to the faces of Stoney and Talley. Being careful not to enter into any sort of chat room, they dial into their "private" e-mail accounts on Casablanca Online ("COL"), the largest public online service in the United States.

134. Although the ECPA provides civil remedies for certain system operator conduct which violates a user's privacy, under the logic of *Greenwood* and *Oliver*, the ECPA could not provide an individual with a legitimate expectation of privacy. See *supra* notes 94–101 and accompanying text.

135. *Greenwood*, 486 U.S. at 43–44.

136. See 18 U.S.C. § 2520.

137. See discussion *supra* Part II.E.

After entering in their passwords, each send detailed accounts of their plan to break out of prison (which eclipse mere preparation and rise to the level of perpetration under the law of criminal attempts) and take over cyberspace. Other than the sysop, no one can access their e-mail accounts.

Stoney promised to advertise for COL in exchange for its promise not to disclose any e-mail to anyone unless a properly executed search warrant forced it to do so. Stoney and COL signed a legally binding contract evidencing their promises. Talley was too lazy to make a similar contract with COL.

With a gun and a smile, Officer McFadden asked the COL system operator to turn over any messages stored in Stoney and Talley's e-mail accounts. McFadden arrests Stoney and Talley and again they move to suppress evidence at a pre-trial hearing.

As ridiculous as the above hypothetical is, the issue of standing remains a difficult one. Do individuals have a legitimate expectation of privacy in their e-mail accounts? While Officer McFadden certainly violated several laws in the pursuit of the e-mail, Stoney and Talley must have standing to assert the illegality of McFadden's actions. Though the exclusionary rule is designed to deter police misconduct,¹³⁸ standing remains a prerequisite for a motion to suppress evidence.¹³⁹

Do Stoney and Talley have standing to suppress their e-mail messages? Under *Katz* and its progeny, both need subjective and objective expectations of privacy. On a subjective level, it would probably be difficult to show that neither had an actual expectation of privacy. This is especially true for Stoney who contracted with COL for the express purpose of ensuring his privacy. Is their expectation of privacy one which society is prepared to recognize as reasonable? Both Stoney and Talley evidenced indicia of control and the power to exclude with the use of their password. The password could be thought of as the functional equivalent of the key in *Jones* which the Court found to be very significant. However, unlike *Jones*, Stoney and Talley "voluntarily disclosed" the contents of their e-mail to the sysop by virtue of the societal understanding concerning the sysop/user relationship. Any possessory interest one might have in their e-mail is contingent on what the sysop decides to do with it. Thus, the power to exclude, traditionally linked to property rights, is tenuous at best in the context of e-mail communications. A legitimate expectation of privacy in this instance will

138. DRESSLER, *supra* note 5, at 239.

139. See generally *id.* at 219.

not flow from the possessory interest Stoney and Talley have in their communications.

The contract Stoney had with COL is rendered meaningless under the logic of *Hoffa*, *Greenwood*, and *Oliver*. The Fourth Amendment simply does not provide protection for a wrongdoers misplaced belief in the trustworthiness of a third party.¹⁴⁰ A contract, like a law or statute, will not create a legitimate expectation of privacy.¹⁴¹ Stoney may try to sue COL for breach of contract (though COL would have a solid duress defense), but that would be his only mechanism for relief. The fact that Officer McFadden grossly violated COL's rights is of no concern. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."¹⁴²

On the other hand, Stoney might try to argue that his contract with COL provided him with a legitimate expectation of privacy similar to that which a tenant would have with his or her landlord.¹⁴³ Like a tenant or hotel guest, a user who has a present possessory interest in the e-mail would have standing to assert the illegality of a government search. Like the landlord-tenant relationship, a system operator may not effectively consent to the search of his user's e-mail communications. In fact, Stoney's contract with COL explicitly states that COL may not divulge the contents of e-mail unless the sysop is provided with a properly executed search warrant. Stoney may contend that such a contract is the functional equivalent of the implicit agreements between a landlord and her tenant, or a hotel and its guest, to not let others in their homes or rooms. Therefore, such a contract would provide Stoney with standing.

On the surface, this argument seems to be pretty convincing. However, implicit within such an argument is the proposition that the sysop/user relationship is analogous to the landlord-tenant relationship. In a landlord-tenant relationship (or hotel-guest relationship) the government searches homes or rooms. In cyberspace, the government searches for electronic data stored in the sysop's computer. The difference in the place searched might prove to be important. First, the Fourth Amendment traditionally has been interpreted to afford the greatest protection to the home and similar dwell-

140. *Hoffa*, 385 U.S. at 302.

141. See *Greenwood*, 486 U.S. at 43; *Oliver v. United States*, 466 U.S. 170 (1984); see also *supra* note 94-101 and accompanying text.

142. *Rakas*, 439 U.S. at 133-34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

143. Stoney might also argue that his situation is like that of the relationship between a hotel/motel guest and manager. See discussion *supra* Part II.C.

ings such as a hotel room.¹⁴⁴ Can the storage area where electronic information is kept logically be equated to a home? The type of activity which occurs at an e-mail address is distinct from the intimate activity which occurs at one's home (or hotel room). Second, a system operator may monitor *all* activities associated with the e-mail address after they are stored in her computer.¹⁴⁵ Conversely, a landlord or hotel manager cannot monitor the activities of her tenant or guest without some sort of contract allowing such monitoring. Clearly, the sysop's ability to monitor a user's e-mail severely curtails any legitimate expectation of privacy. This second level of differentiation would probably lead a court to conclude that a defendant in such a situation would not have standing despite any contract. There is little reason to think that electronic mail will be treated any differently from "private" chat rooms.

D. *The System Operator*

In addition to communicating via e-mail that day, Stoney and Talley decided to open up their own web-site and e-mail service. In order to access their sites, a person needed a password and rejection letter from the Cyber Law Center. As system operators, Stoney and Talley had complete dominion and control over the accessibility of their site.

Officer McFadden surreptitiously hacks into Stoney and Talley's web site and discovers pictures evidencing child pornography and bestiality in violation of state law. Stoney and Talley move to suppress the evidence as a violation of their Fourth Amendment rights.

Here, Stoney and Talley would have standing to assert the illegality of the search. They have a possessory interest in the website and the computer which they share with no one else. The password protection evidences self-protective steps which would rise to a legitimate expectation of privacy in this example because no one else aside from Stoney and Talley can circumvent the password to glean information from their web-site.¹⁴⁶ Because Stoney and Talley can choose who enters their site, they seem to have the

144. See *Boyd v. United States*, 116 U.S. 616 (1886) (explaining the historical backdrop for Fourth Amendment jurisprudence).

145. See *supra* notes 108–11 and accompanying text.

146. One might question the truth of this statement considering that McFadden hacked into Stoney and Talley's website. The difference here lies in the fact that the garbage was not taken to the curbside. *Greenwood* is taken out of the equation, assuming files are not deleted into Cyberspace. Here, it is unlikely that e-mail will be deleted into Cyberspace. Any deletion should remain within the physical confines of the computer. See *supra* notes 94–101, accompanying text, and discussion in Part IV.B.

power to exclude which is important in attaining a legitimate expectation of privacy. Stoney and Talley, as sysops, are direct victims of the illegal search. Thus, system operators seemingly would have standing to assert the illegality of police action when they take the self-protective steps required under the Fourth Amendment.

E. *Pen Register and Beeper Analogies*

Hypothetically, if the police used a device to track where one travels in cyberspace, there is no reason to think that the use of such technology would constitute a search under the Fourth Amendment. When one travels along the digital highway, such movements are knowingly exposed to the public and merit no Fourth Amendment protection. The digital web where a user journeys would be considered the functional equivalent of the public streets. A cyber-beeper¹⁴⁷ or pen register would seem to comport with the Court's analysis in *Smith and Knotts*. As long as a user travels along a *public* area in cyberspace, where one can legally view their movements, cyber-tracking devices would not constitute a search.

F. *Data Encryption*

While searching through the records of Stoney and Talley's conversations in the public chat room at Worms R' Us, Officer McFadden discovers several lines of garbled text sent between Stoney and Talley. Stoney and Talley encrypted the most detailed portions of their plan to destroy the Cyber Law Center. Presently, there is no method to decrypt a message unless one has the key to decode it. Stoney and Talley each memorized the keys and have never written them down.

Encryption of data is the only surefire way to ensure privacy.¹⁴⁸ Only those who have the key can decrypt an encoded message. Encrypted data acts like an impenetrable bomb shelter. Nothing can break into it. It would seem that the power to exclude others with this technology is absolute. That being the case, it would seem one will always have standing to challenge the illegality of a search or seizure of encrypted data. By definition, it is taken out of the public view.

For every rule there is an exception. The United States government created encryption software called the "Clipper."¹⁴⁹ Those who use Clipper

147. A cyber-beeper is a hypothetical label that this author is attaching to a device used to track movement in cyberspace.

148. NETLAW, *supra* note 102, at 181-85.

149. *Id* at 182.

encryption must be aware that the government holds the keys for decryption in escrow with government agencies.¹⁵⁰ This factor would diminish one's legitimate expectation of privacy. Further, if technology becomes available to the public which would allow one to decrypt at will, then encryption will become obsolete as a means for ensuring a legitimate expectation of privacy under the rationale of *Dow Chemical*.

V. CONCLUSION

Based upon the above analysis, it would seem that encryption of data is the only way a *user* can attain a legitimate expectation of privacy for purposes of standing under the Fourth Amendment. The *system operator* can gain a legitimate expectation of privacy in cyberspace, but she must take adequate self-protective steps equivalent to those outlined in *Katz* and its progeny. Thus, the criminal defense attorney should advise her clients not to store any information in cyberspace unless they would be willing to shout out the same information in a crowded public theater.

"He looked up again at the portrait of Big Brother. The colossus that bestr[ides] the world!"¹⁵¹

Brian I. Simon*

150. *Id.*

151. GEORGE ORWELL, 1984 at 244 (NAL Penguin Inc. 1961). In Erich Fromm's afterword to 1984, he crystallized the impetus this author had for altering the tense in one of the last passages George Orwell wrote in 1984.

George Orwell's 1984 is the expression of a mood, and it is a warning. The mood it expresses is that of near despair about the future of man, and the warning is that unless the *course of history* changes, men all over the world will lose their most human qualities, will become soulless automatons, and will not even be aware of it.

Erich Fromm, *Afterword* to GEORGE ORWELL, 1984 (NAL Penguin Inc. 1961) (emphasis added).

Unless the current state of the law changes (§ 2515 of the ECPA should be considered a prime candidate for change), and the courts and Congress act with a keen eye toward learning about the Internet, it is this author's opinion that that we will forever remain stuck in a sand trap throughout the "course of history."

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Temporary Immunity: Distinguishing Case Law Opinions on Executive Immunity and Privilege as the Supreme Court Tackles an Oxymoron

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"I do not believe that the meaning of the Constitution was forever fixed at the Philadelphia convention. The true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making."

—Supreme Court Justice
Thurgood Marshall¹

1. THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 4 (Robert F. Tedeschi, Jr. ed., 1st ed. 1993).

I. INTRODUCTION

Immunity, by definition, is a permanent exemption from proceeding with a legal duty.² A maxim of law holds that words of exemption are not to be construed to import any liability.³ However, privilege has been defined as a particular benefit or advantage enjoyed by a person or class, beyond the common advantages of ordinary citizens.⁴ Additionally, a privilege is known as

[a]n exemption from some burden or attendance, with which certain persons are indulged, from a supposition of law that the stations they fill, or the offices they are engaged in, are such as require all their time and care, and that, therefore, without this indulgence, it would be impracticable to execute such offices to that advantage which the public good requires.⁵

This broad definition of privilege is the basis of President Clinton's argument against Paula Jones. These differences between "immunity" and "privilege" will be apparent as the United States Supreme Court decisions and reasons for each are examined herein.

This article distinguishes the concepts of executive immunity from executive privilege, as interpreted by the United States Supreme Court, in an attempt to provide guidance for those interested in understanding the arguments advanced in *Jones v. Clinton*.⁶ Part II of this article begins by examining the early arguments for executive immunity. Part II also conducts an in-depth review of the history of Supreme Court decisions and policy justifications affecting the executive immunity doctrine.

After reviewing the currently applicable Nixon immunity cases, this article examines the history of Supreme Court decisions involving executive privileges. Although few Supreme Court decisions have concerned executive privilege, the procedure of claiming an executive privilege parallels those arguments advanced in support of President Clinton's claim of a

2. BLACK'S LAW DICTIONARY 751 (6th ed. 1990).

3. *Id.*

4. *Id.* at 1197.

5. BLACK'S LAW DICTIONARY 1077 (5th ed. 1979).

6. 72 F.3d 1354, 1363 (8th Cir.), *aff'd in part and rev'd in part*, 72 F.3d 1354 (8th Cir.), *cert. granted*, 116 S. Ct. 2545 (1996) [hereinafter *Jones II*] (holding that President Clinton is not temporarily immune from civil process, from discovery through trial, during his tenure as President of the United States).

“temporary immunity.” Part IV of this article presents the facts and arguments advanced in *Jones*, from the trial court to the Supreme Court. In addition, the holdings and rationales advanced in both the trial and appellate courts are surveyed.

After concluding that President Clinton does not have a constitutionally sound claim for presidential “immunity,” Part IV of this article argues that the relief sought by President Clinton is more akin to the term *presidential privilege*. Finally, Part V examines the issues of whether the trial court has the discretion to stay the trial of the President, and whether the President or the plaintiff should bear any burden of proof.

II. THE HISTORY OF EXECUTIVE IMMUNITIES

Immunities are codified in both state and federal constitutions, statutes, and the common law.⁷ First, a state or federal statute may provide a person immunity from prosecution, immunity from particular testimony, or immunity in exchange for incriminating testimony.⁸ The most notable form of common law immunity is the doctrine of sovereign immunity, “which protects local, state, and federal governments from suit.”⁹ The historical roots of common law immunity can be traced back to the English maxim, ‘the King can do no wrong.’¹⁰ Second, the United States Constitution enumerates certain governmental immunities. Specifically, Article I, section 6 of the United States Constitution, which contains the Arrest Clause and Speech or Debate Clause, states that:

The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.¹¹

7. See William F. Allen, Note: *President Clinton's Claim of Temporary Immunity: Constitutionalism in the Air*, 11 J.L. & POL. 555, 558–60 (1995).

8. *Id.* at 558–60.

9. *Id.* at 558.

10. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984) (citations omitted); see e.g. R.J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 311 (1959).

11. U.S. CONST. art. I, § 6.

Although immunity has been granted to the legislative¹² and judicial¹³ branches of government, this paper is confined to the examination of immunities extended to the executive branch.

The roots of executive immunity can be found in the English common law and the doctrine of sovereign immunity.¹⁴ "While the latter doctrine — that the 'King can do no wrong' — did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability."¹⁵ "In general, there is no executive immunity — common law or otherwise — from criminal prosecution."¹⁶

Some commentators argue "that the Constitution's provision of impeachment as a means of removing 'civil Officers' bars any indictment or prosecution of impeachable officials until after their removal."¹⁷ Regardless, in *Marbury v. Madison*,¹⁸ Chief Justice John Marshall authored the most often cited rule that "[t]he very effence [sic] of civil liberty certainly confits [sic] in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to

12. See *Gravel v. United States*, 408 U.S. 606, 628–29 (1972) (holding both congressional aides and members of Congress immune under the Speech or Debate Clause for actions which lead to illegal resolutions); *United States v. Johnson*, 383 U.S. 169, 184–85 (1966) (holding that judicial inquiry into the substance and motivation of a congressman's speech was in violation of the Speech or Debate Clause); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (holding that the civil rights statute did not create civil liability for acts by committee and individual members of Congress during their legitimate legislative activities).

13. See *Stump v. Sparkman*, 435 U.S. 349, 362–63 (1978) (holding that informal proceeding does not deprive a judge of absolute immunity from damages liability); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (holding state court judges absolutely immune from civil suits based on constitutional grounds pursuant to 42 U.S.C. § 1983 claims); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 357 (1871) (holding that judges are absolutely immune for acts committed within their judicial jurisdiction).

14. Laurier W. Beaupre, Note, *Birth of a Third Immunity: President Bill Clinton Secures Temporary Immunity From Trial*, 36 B.C. L. REV. 725, 729 (1995); Jennifer L. Long, Note, *How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity*, 30 VAL. U. L. REV. 283, 292 (1995); Michael T. Matraia, Note, *Running For Cover Behind Presidential Immunity: The Oval Office as Safe Haven from Civil Suits*, 29 SUFFOLK U. L. REV. 195, 199 (1995); Theodore P. Stein, *Nixon v. Fitzgerald: Presidential Immunity as a Constitutional Imperative*, 32 CATH. U. L. REV. 759, 762 (1983); Gray, *supra* note 10, at 305.

15. *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) (citations omitted).

16. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-14, at 268 (2d ed. 1988).

17. *Id.*

18. 5 U.S. (1 Cranch) 137 (1803).

afford that protection.”¹⁹ Consequently, “[t]he Supreme Court has long recognized a federal common law immunity protecting executive officials, in the absence of congressionally-created exceptions, from civil liability to private plaintiffs arising out of acts performed ‘in the discharge of duties imposed upon [such officials] by law.’”²⁰ Initially, two public policy arguments were established for extending immunity to executive officials. This immunity,

apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.²¹

A. *The Supreme Court’s Early Immunity Cases*

Although the United States Constitution enumerates executive powers and duties vested in the President, it fails to specifically impart any special privileges or immunities upon the executive.²² Although “presidential immunity is mentioned neither in the Constitution nor in any statute, it did prove a topic for debate among early statesmen.”²³ “John Adams and Oliver Ellsworth argued that ‘the President, personally, was not the subject to any process whatsoever,’ reasoning that to do otherwise would allow the courts to ‘stop the whole machine of Government.’”²⁴ Nonetheless, “Charles Pinckney argued that the framers deliberately chose *not* to grant the President immunity because they ‘well knew how oppressively the power of undefined privileges has been exercised in Great Britain, and were determined no such authority should ever be exercised here.’”²⁵ “The absence of

19. *Id.* at 163.

20. *TRIBE*, *supra* note 16, at 269 (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)).

21. *Scheuer*, 416 U.S. at 240 (citations omitted).

22. *See generally* U.S. CONST. art. II (memorializing the President’s powers and duties).

23. *Beaupre*, *supra* note 14, at 731.

24. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982) (citing W. MACLAY, *THE JOURNAL OF WILLIAM MACLAY* 167 (1890 ed.))).

25. *Id.* at 732 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 777 (1982) (White, J., dissenting) (citing 10 *ANNALS OF CONG.* 72 (1800))).

Constitutional authority left the creation of an American immunity doctrine where it had been in England: in the courts."²⁶

In 1866, in *Mississippi v. Johnson*,²⁷ the United States Supreme Court faced the issue of whether an injunction could restrain the President from carrying into effect an act of Congress alleged to be unconstitutional.²⁸ The State of Mississippi filed a bill to enjoin Andrew Johnson and his officers from executing two acts of Congress, commonly called the Reconstruction Acts.²⁹ In President Andrew Johnson's defense, Attorney General Stanbery argued that, due to the office which the President holds, the President is immune from service of process or the jurisdiction of any court.³⁰ Stanbery continued:

There is only one court or *quasi* court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.³¹

Writing for the Court, Chief Justice Salmon P. Chase distinguished the performance of a ministerial duty from the exercise of discretion.³² The Court concluded that "the duty of the President in the exercise of the power to see that the laws are faithfully executed . . . is in no just sense ministerial. It is purely executive and political."³³ The Court held that, "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."³⁴ Although the Court never addressed the issue of whether the

26. *Id.* at 732-33 (citations omitted).

27. 71 U.S. (4 Wall.) 475 (1866).

28. *Id.* at 498.

29. *Id.* at 475.

30. *Id.* at 484.

31. *Id.* at 484-85.

32. *Johnson*, 71 U.S. (4 Wall.) at 498-99.

33. *Id.* at 499.

34. *Id.* at 501.

President is immune from service of process or jurisdiction, "some commentators broadly interpreted *Johnson* to mean that the President is immune from legal process when performing what he deems to be his constitutional duties."³⁵

In *United States v. Lee*,³⁶ the issue concerned whether an action could be maintained against the defendants, who were military officers and executive officials of the United States, for the possession of approximately 1000 acres, known as Arlington estate.³⁷ George W. P. C. Lee, the original plaintiff, devised this land to his daughter, the wife of General Robert E. Lee, for life, and after her death to the plaintiff. The United States purchased the land in controversy at a tax sale and retained possession of the property for more than ten years. Frederick Kaufman and Richard P. Strong, defendants, were tax commissioners in charge of the certificate of sale to Arlington estate, and both defendants were under orders from the secretary of war. The orders included that part of the property was to be used for a military station, and the rest, for a national cemetery to bury deceased soldiers and sailors, today known as the Arlington Cemetery.³⁸ The case was first decided in the Circuit Court of the United States for the Eastern District of Virginia, and the jury found the tax certificate and sale did not divest the plaintiff of his title to the property.³⁹ Attorney General Devens argued on appeal that the courts had no jurisdiction over the subject in controversy, by reason of official immunity, and that "all the proceedings be stayed and dismissed"⁴⁰

Writing for the United States Supreme Court, Justice Samuel F. Miller stated:

The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government

. . . .

[However,] [n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with

35. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 7.1, at 235 (5th ed. 1995).

36. 106 U.S. 196 (1882).

37. *Id.* at 199.

38. *Id.* at 198.

39. *Id.* at 199.

40. *Id.* at 198.

impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.⁴¹

The Court went on to affirm the decision of the circuit court, further stating that a court's "power and influence rest[s] solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land"⁴²

The arguments advanced in these early immunity cases laid the foundation for a judicially-created executive immunity doctrine. "Understanding the importance of the immunity doctrine as applied to the President requires an analysis of currently existing immunity law and its historical foundations."⁴³

B. Supreme Court Development of Executive Immunity

The scope of the immunities extended to the executive branch were "traditionally quite broad and protected the defendant even in cases that undoubtedly involved tortious behavior."⁴⁴ Federal courts granted immunity to the executive branch based on the judicial immunity developed in *Bradley v. Fisher*.⁴⁵ "Just as the judicial system could not function if judges feared lawsuits . . . the executive branch could not function if officials could not act in the public interest without fearing liability."⁴⁶

1. Absolute Immunity

Originally, the federal courts took a broad, liberal view of immunity when executive officers were sued under state law claims, "holding that in such cases the federal officers held an absolute immunity for acts within the scope of their discretion."⁴⁷ This tolerant approach to the executive immunity doctrine extended protection, "even for malicious actions if those actions were deemed to be within the 'outer perimeter' of the federal duty."⁴⁸

41. *Lee*, 106 U.S. at 220.

42. *Id.* at 223.

43. Long, *supra* note 14, at 292.

44. KEETON ET AL., *supra* note 10, § 131, at 1032. "The idea was that . . . social values of great importance required that the defendant escape liability. The immunity thus might be thought to differ from a privilege. . . ." *Id.*

45. 80 U.S. (13 Wall.) 335 (1871).

46. Beaupre, *supra* note 14, at 734.

47. KEETON ET AL., *supra* note 10, § 132, at 1060.

48. *Id.*

Thus, absolute immunity permanently bars a plaintiff's civil damages claim regardless of the official's underlying motive.⁴⁹ Originally, "[h]igh-ranking executive branch officials donned the judge's absolute immunity cloak in 1896."⁵⁰

In *Spalding v. Vilas*,⁵¹ the issue was whether the head of an executive department, here the Postmaster General, was liable for damages on account of official communications made within his authority, pursuant to an act of Congress, due to the personal or malicious motive which prompted his action.⁵² An attorney representing local postmasters in a salary dispute alleged that the Postmaster General maliciously sent letters to the attorney's clients with the intent to circumvent and prevent the attorney from recovering his fees.⁵³

Writing for the Court, Justice John M. Harlan proclaimed:

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts.⁵⁴

As with judicial immunity, the Court continued to distinguish between actions taken by an executive department head which are "manifestly or palpably beyond his authority" and actions taken within the executive's discretion or authority under the law.⁵⁵ The Court went on to hold that an executive department head was not liable for a civil suit predicated on actions taken within the official's authority.⁵⁶ The Court reasoned that, in

49. Matraia, *supra* note 14, at 204.

50. Beaupre, *supra* note 14, at 734.

51. 161 U.S. 483 (1896).

52. *Id.* at 484. See also *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871) (holding that judges of courts of general jurisdiction are absolutely immune from civil suits for judicial actions within the court's jurisdiction, and, therefore, any exercise of that jurisdiction cannot be affected by any consideration of the motives with which the acts are done).

53. *Spalding*, 161 U.S. at 487-88.

54. *Id.* at 498.

55. *Id.*

56. *Id.*

keeping within the limits of one's authority, an executive department head "should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages," because to do so would "cripple the proper and effective administration of public affairs as entrusted to the executive branch . . ."⁵⁷ The preceding policy argument was the underlying proposition and main justification for the Supreme Court's extension of immunity to executive branch officials.

In *Barr v. Matteo*,⁵⁸ the issue was whether the absolute immunity granted to executive department heads should be extended to lower ranking executive officials.⁵⁹ Two employees from the Office of Rent Stabilization sued the Acting Director, William Barr, for defamation based on the issuance of a press release in which its publication and terms originated by reason of the Acting Director's malice.⁶⁰ Linda A. Matteo and John J. Madigan, the two employees, devised a plan to spend \$2,600,000 of agency funds earmarked for terminal-leave payments, whereby agency employees would be discharged, paid their terminal-leave, rehired immediately as temporary employees, and later restored to permanent status.⁶¹ The text of the press release included comments that William Barr would demand the resignations of employees who took cash leave settlements because he violently opposed it. He charged that his first official act as director would be to ferret out and suspend these employees.⁶²

Writing for a plurality, Justice John M. Harlan reasoned that Barr's action was within the "outer perimeter of . . . [his] line of duty," and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively."⁶³ Thus, the Court extended absolute immunity beyond executive department heads to executive officers generally.⁶⁴ While applying this functional approach to immunity, Justice Harlan added a third policy argument for extending immunity to

57. *Id.*

58. 360 U.S. 564 (1959).

59. *Id.* at 569.

60. *Id.* at 565.

61. *Id.* at 565-56. Various senators referred to the plan as "'a highly questionable procedure,' a 'raid on the Federal Treasury,' 'a conspiracy to defraud the Government of funds,' and as 'definitely involv[ing] criminal action.'" *Id.* at 567 n.4 (citation omitted).

62. *Matteo*, 360 U.S. at 567 n.5.

63. *Id.* at 575.

64. *Id.* at 574; see also *TRIBE*, *supra* note 16, at 269 n.5 (explaining that immunity rules extend beyond "'executive officers of cabinet rank,'" protecting executive officers generally).

executive officials when he stated that damage suits “would consume time and energies which would otherwise be devoted to governmental service”⁶⁵ This policy argument is the main trust of President Clinton’s justification for extending presidential immunity to protect an incumbent President from most civil legal process, from discovery through trial.

2. Qualified Immunity

Beginning in the 1970s, many immunity cases involved allegations of state and federal officers violating federal laws.⁶⁶ The Civil Rights Act was the main source for claims alleging violations of constitutional rights.⁶⁷ When an officer violated a federal constitutional right, the Supreme Court provided protection for the officer but qualified the immunity granted.⁶⁸ Originally, qualified immunity had a subjective element. Today, the plaintiff is required to establish a violation of “statutory or constitutional rights of which a reasonable person would have known.”⁶⁹

In *Pierson v. Ray*,⁷⁰ three policemen of the City of Jackson arrested and charged ministers, who were members of a group of fifteen white and Negro Episcopal clergymen, with violating Mississippi law for “attempt[ing] to use segregated facilities at an interstate bus terminal.”⁷¹ The ministers were eventually convicted of the offense by Judge Spencer.⁷² Following their convictions, the ministers instituted a lawsuit alleging that the police officers and the judge had violated the Civil Rights Act and the common law of Mississippi for false arrest and imprisonment.⁷³ At issue was whether the police officers and judges were immune from liability for damages actions under the Civil Rights Act.⁷⁴

Writing for the Court, Chief Justice Earl Warren reasoned that Congress never indicated that 42 U.S.C. § 1983, which effects all people who under color of law deprive another of his civil rights, would “abolish wholesale all

65. *Matteo*, 360 U.S. at 571; *see also* Stein, *supra* note 14, at 764 (adding a third policy justification for extending the immunity doctrine to federal executive officials generally).

66. KEETON ET AL., *supra* note 10, at 1060–61.

67. *Id.* at 1061.

68. *Id.*

69. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

70. 386 U.S. 547 (1967).

71. *Id.* at 549.

72. *Id.*

73. *Id.* at 550.

74. *Id.* at 548.

common-law immunities.”⁷⁵ Writing on judicial immunity, Warren further reasoned,

[T]his Court held in *Tenney v. Brandhove*, . . . that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.⁷⁶

Consequently, the Court held Judge Spencer absolutely immune from damages liability for his role in these convictions.⁷⁷ Nevertheless, the Court stated that “[t]he common law has never granted police officers an absolute and unqualified immunity. . . .”⁷⁸

The police officers argued that they should not be liable for acting in good faith and with probable cause while making an arrest under a statute that they believed to be valid.⁷⁹ The Court reasoned that “[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.”⁸⁰ For the first time in the Supreme Court, police officers were afforded a qualified immunity in actions alleging constitutional violations.

[T]he defense of good faith and probable cause . . . available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under [42 U.S.C.] § 1983. . . . We agree that a police officer is not charged with predicting the future course of constitutional law.⁸¹

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁸² the issue concerned whether a violation of the Fourth Amendment by a federal agent acting under color of law gives rise to a damages cause of action.⁸³ Allegedly, agents of the Federal Bureau of Narcotics carried out an arrest of Webster Bivens and a search of his apartment,

75. *Ray*, 386 U.S. at 554.

76. *Id.* at 554–55 (citations omitted).

77. *Id.* at 553.

78. *Id.* at 555.

79. *Id.*

80. *Ray*, 386 U.S. at 556–57.

81. *Id.* at 557.

82. 403 U.S. 388 (1971).

83. *Id.* at 389.

without a warrant and using unreasonable force.⁸⁴ The Court reiterated that the “Fourth Amendment operates as a limitation upon the exercise of federal power”⁸⁵ Although the United States Supreme Court never ruled on the immunity issue, the Court repeated the declaration made in *Marbury v. Madison*, that “[t]he very effence [sic] of civil liberty certainly confits [sic] in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁸⁶ The Court held that an alleged violation of the Fourth Amendment by federal officials gives rise to a cause of action for damages.⁸⁷

The case was remanded to the United States Court of Appeals for the Second Circuit, where the appellate court fashioned a two-step test to determine whether official actions were within the established immunity doctrine.⁸⁸ First, it must be determined whether the officials were acting “within the outer perimeter of [their] line of duty.”⁸⁹ If so, were they “performing the type of ‘discretionary’ function that entitles them to immunity from suit[?]”⁹⁰ The court of appeals determined that the agents were acting within the scope of their duty, but rejected the claim of immunity because the agents were not engaged in the performance of a discretionary act.⁹¹

Writing for the court, circuit Judge Medina went further and established a partly subjective, partly objective defense to claims against officers charged with violating one’s constitutional rights.⁹² Subjectively, the officials must allege and prove that they acted in good faith.⁹³ Objectively, officials must have a reasonable belief in the validity of their actions.⁹⁴ “By asserting violations of constitutional rights as the basis for their suits, litigants stripped the absolute immunity defense from executive officials . . . [.]” spawning a new era for the doctrine of immunity, titled qualified immunity.⁹⁵

84. *Id.*

85. *Id.* at 392.

86. *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

87. *Bivens*, 403 U.S. at 397.

88. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1343 (2d Cir. 1972).

89. *Id.* at 1343.

90. *Id.*

91. *Id.*

92. *Id.* at 1348.

93. *Bivens*, 456 F.2d at 1348.

94. *Id.*

95. *Beaupre*, *supra* note 14, at 736.

In *Scheuer v. Rhodes*,⁹⁶ the personal representatives of the estates of three students who died on the campus of Kent State University brought various damage actions under the Civil Rights Act against the Governor of Ohio, the Adjutant General of the Ohio National Guard, various other National Guard officers, and the University president.⁹⁷ These officials were charged with allegedly acting under color of state law by intentionally causing the deployment of the National Guard with orders to perform illegal acts.⁹⁸

Writing for the Court, Chief Justice Burger stated:

Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."⁹⁹

After an analysis and rejection of the common law absolute immunity afforded officials, Chief Justice Burger went on to say:

[Q]ualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.¹⁰⁰

Chief Justice Burger supplied a three-step analysis for courts to apply when addressing issues of qualified immunity for state officials.¹⁰¹ First, a

96. 416 U.S. 232 (1974).

97. *Id.* at 234.

98. *Id.* at 235.

99. *Id.* at 237 (citing *Ex parte Young*, 209 U.S. 123, 159–60 (1908)). "*Ex parte Young* . . . involved a question of the federal courts' injunctive power, not, as here, a claim for monetary damages." *Id.* at 237–38.

100. *Scheuer*, 416 U.S. at 247–48.

101. *Id.* at 250.

court must determine whether the official was acting within the scope of his duties.¹⁰² Second, the court must decide whether the official acted within the “range of discretion permitted [to] the holders of such office . . .” under the law.¹⁰³ Finally, the fact-finder must determine whether the official acted in the good faith belief that his actions were within the law.¹⁰⁴

In the instant case, the Court ordered that the case be reversed and remanded so the lower court could make a finding of good faith.¹⁰⁵ But, “after *Scheuer*, lower federal courts applied varying standards, unsure of whether a government official must satisfy an objective test, a subjective test, or both.”¹⁰⁶ *Scheuer* represents the first time the Supreme Court departed from the all-or-nothing approach under absolute immunity, seeking a more balanced approach, by weighing the competing policy interests affecting executive immunity, with the recognition of qualified immunity. According to Justice Lewis F. Powell, Jr.:

Scheuer established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in ‘good faith.’ This ‘functional’ approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity.¹⁰⁷

In *Butz v. Economou*,¹⁰⁸ the plaintiffs filed suit against federal officials within the Department of Agriculture claiming that the investigation and administrative proceeding, to revoke or suspend plaintiffs’ registration, was in retaliation for criticism of the Department and in violation of federal constitutional rights.¹⁰⁹ The defendants moved to dismiss the action on the

102. *Id.*

103. *Id.*

104. *Id.* See also *Matraia*, *supra* note 14, at 210 (reciting the holding that qualified immunity applies if the official acted in good faith and believed that the actions taken were within the law).

105. *Scheuer*, 416 U.S. at 250.

106. *Matraia*, *supra* note 14, at 210.

107. *Nixon v. Fitzgerald*, 457 U.S. 731, 746 (1982).

108. 438 U.S. 478 (1978), *aff’d sub nom.* *Economou v. United States Dep’t of Agric.*, 633 F.2d 203 (2d Cir. 1980).

109. *Id.* at 480.

grounds of official immunity arguing that all federal officials are absolutely immune from any liability for damages, even if in the course of enforcing the law, they violated the plaintiffs' constitutional rights.¹¹⁰ Writing for the Court, Justice Byron R. White reexamined the history of immunity. Justice White stated that "[t]he immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law."¹¹¹ The Court distinguished *Barr*¹¹² and *Spalding*¹¹³ on the ground that neither suit involved the liability of officials who had exceeded their constitutional limits, as was the case here.¹¹⁴ Justice White stated the opinion of the Court:

We agree . . . that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983 To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs.¹¹⁵

The Court clarified another element for courts to analyze when the litigation involves an alleged constitutional violation. First, courts should determine whether the plaintiff is entitled to a damages remedy for the particular constitutional violation.¹¹⁶ Then, courts should "address how best to reconcile the plaintiff's right to compensation with the need to protect the decision-making processes of an executive department."¹¹⁷ Although, the Supreme Court held that federal executive officials are only entitled to a qualified immunity for constitutional violations, absolute immunity will be recognized for those "officials whose special functions require a full exemp-

110. *Id.* at 483.

111. *Id.* at 489.

112. *Barr v. Matteo*, 360 U.S. 564 (1959).

113. *Spalding v. Vilas*, 161 U.S. 483 (1896).

114. *Economou*, 438 U.S. at 495.

115. *Id.* at 500, 504-05.

116. *Id.* at 503.

117. *Id.*

tion from liability.”¹¹⁸ In so holding, the Court first ruled that persons performing adjudicatory functions within federal agencies are entitled to absolute immunity for their quasi-judicial acts.¹¹⁹ Second, agency officials who perform functions analogous to those of a prosecutor were determined to be entitled to absolute immunity from damages liability for their decisions to initiate or continue proceedings.¹²⁰ Finally, an agency attorney who arranges for presentation of evidence in the course of proceedings was entitled to absolute immunity from suit based on the introduction of such evidence.¹²¹ The Court remanded the case for further proceedings consistent with its opinion.¹²²

The preceding case law illustrates the extent to which the Supreme Court rationalized the scope and need for executive immunity. As a result, the United States Supreme Court has drawn the line of executive immunity between those acts which fall within a particular official's discretion and functional responsibilities. In the Nixon immunity cases,¹²³ however, the Supreme Court expanded the scope of immunity for the President of the United States. Presidential immunity continues to apply to civil actions for damages, but the Court consciously avoided any application of the functional approach for the Presidency. Although presidential immunity is limited for those acts taken within the zone of a President's constitutional duties, the zone of constitutional responsibilities are interpreted rather broadly. Besides granting an absolute immunity for President Nixon, the Supreme Court stated its willingness to extend absolute immunity for certain functions exercised by executive branch officials.

118. *Id.* at 508.

119. *Economou*, 438 U.S. at 514. See also *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (holding state court judges absolutely immune from civil suits based on constitutional grounds pursuant to 42 U.S.C. § 1983 claims); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1872) (holding judges absolutely immune from civil suit “for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction . . .”).

120. *Economou*, 438 U.S. at 516. See also *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (extending absolute immunity to state prosecutors and holding a state prosecutor immune from suits pursuant to 42 U.S.C. § 1983 claims). The *Pachtman* Court reasoned that “[i]t is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as ‘quasi-judicial’ officers, and their immunities being termed ‘quasi-judicial’ as well.” *Id.* at 423 n.20.

121. *Economou*, 438 U.S. at 517. The *Economou* Court saw no difference between a prosecutor's function in presenting evidence in a judicial proceeding from that of the agency attorney presenting evidence in an administrative proceeding. *Id.* at 516.

122. *Id.* at 517.

123. The phrase “Nixon immunity cases” refers to *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

3. The Nixon Immunity Cases

On June 24, 1982, in *Nixon v. Fitzgerald*,¹²⁴ an intensely divided Supreme Court granted the President absolute immunity from all civil damage claims alleging acts within the "outer perimeter" of the President's official duties and responsibilities.¹²⁵ That same day, the Supreme Court handed down *Harlow v. Fitzgerald*,¹²⁶ in which the Court declined to extend absolute immunity to presidential aides.¹²⁷ These Nixon immunity cases introduce the current law applicable to disputes involving both the absolute and qualified immunities available to the President and all other executive officials in general.

The *Harlow* case actually began in January of 1970, when A. Earnest Fitzgerald, a management analyst with the Air Force Department, lost his job during a "departmental reorganization and reduction in force"¹²⁸ Back in November of 1968, Fitzgerald "attained national prominence" while testifying before a Congressional Subcommittee that there were approximately \$2,000,000,000 in cost overruns on a new transport airplane.¹²⁹ "Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the [Congressional] Subcommittee . . . convened public hearings on Fitzgerald's dismissal."¹³⁰ After a flurry of media questions concerning Fitzgerald's termination, President Nixon attempted to reassign Fitzgerald to the Bureau of the Budget.¹³¹ In reality, "Fitzgerald's proposed reassignment encountered resistance within the administration" because of Fitzgerald's poor loyalty.¹³² As a result, his position was abolished.¹³³ Fitzgerald complained to the Civil Service Commission ("Commission") which, after a highly publicized closed hearing, concluded that Fitzgerald's dismissal was grounded on "reasons purely personal," thus the reasons for his termination were an "impermissible basis for a reduction in force"¹³⁴

124. 457 U.S. 731 (1982).

125. *Id.* at 757.

126. 457 U.S. 800 (1982).

127. *Id.* at 817-18.

128. *Nixon*, 457 U.S. at 733.

129. *Id.* at 734.

130. *Id.*

131. *Id.* at 735.

132. *Id.* at 735-36.

133. *Nixon*, 457 U.S. at 736-37.

134. *Id.* at 738 (citation omitted).

The Commission awarded Fitzgerald back pay and recommended that he be ordered a new position within the Defense Department.¹³⁵

Consequently, "Fitzgerald filed a suit for damages in the United States District Court . . . rais[ing] essentially the same claims presented to" the Commission.¹³⁶ The complaint was dismissed for all defendants based upon the statutes of limitations, except for White House aide Alexander Butterfield.¹³⁷ More than eight years after Fitzgerald's initial discharge, Fitzgerald amended the complaint to include former President Nixon and another White House aide Bryce Harlow.¹³⁸ The district court denied the defendant's motion for summary judgment and ruled that President Nixon was not entitled to absolute immunity.¹³⁹ The United States Supreme Court granted certiorari after the appellate court summarily dismissed the appeal.¹⁴⁰

Writing for a plurality, Justice Lewis F. Powell, Jr. reasoned that since "[c]onsiderations of 'public policy and convenience'" justified "judicial recognition of immunity from suits arising from official acts," with cases involving the President, the inquiries into history essentially involve "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."¹⁴¹ Justice Powell focused on two policy issues that raised "unique risks to the effective functioning of government."¹⁴² First, "[b]ecause of the singular importance of the President's duties . . . there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office."¹⁴³ Second,

[i]n view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public du-

135. *Id.* at 738–39 n.17.

136. *Id.* at 739.

137. *Id.*

138. *Nixon*, 457 U.S. at 740.

139. *Id.* at 740–41.

140. *Id.* at 741.

141. *Id.* at 745, 748.

142. *Id.* at 751.

143. *Nixon*, 457 U.S. at 751–52 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)).

ties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.¹⁴⁴

"In view of the special nature of the President's constitutional office and functions," the Court held that the President is entitled to absolute immunity against damages liability for acts within the "outer perimeter" of his official responsibilities.¹⁴⁵

Even though the President was afforded absolute immunity from civil damages suits, the Court reasoned that the "[n]ation [is not] without sufficient protection against misconduct on the part of the Chief Executive."¹⁴⁶ The Court specifically identified impeachment as a constitutional remedy for misconduct by a President, including "formal and informal checks," such as, "constant scrutiny by the press," "[v]igilant oversight by Congress," the President's "desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature."¹⁴⁷ The Court concluded that "[t]he existence of alternative remedies and deterrents establishes that absolute immunity will not place the President 'above the law.' For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends."¹⁴⁸

However, the plurality opinion was intensely criticized by the dissenters. Writing the dissent, Justice Byron R. White argued:

Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law.¹⁴⁹

Justice White accurately summarized the history of the American common law doctrine of executive immunity during his rebuttal:

144. *Id.* at 753.

145. *Id.* at 756.

146. *Id.* at 757.

147. *Id.*

148. *Nixon*, 457 U.S. at 758.

149. *Id.* at 766-67 (White, J. dissenting).

The Court's response, until today, to this [immunity] problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decisionmaking within that function The functional approach to the separation-of-powers doctrine and the Court's more recent immunity decisions converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all Presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in *United States v. Nixon*.¹⁵⁰

*Harlow v. Fitzgerald*¹⁵¹ addressed the scope of immunity available to senior aides and advisors of the President of the United States involving lawsuits for damages predicated upon their official acts.¹⁵² White House aides Alexander Butterfield and Bryce Harlow were alleged to have joined former President Richard M. Nixon¹⁵³ in a conspiracy to violate constitutional and statutory rights of the respondent A. Earnest Fitzgerald.¹⁵⁴ Consequently, Butterfield and Harlow appealed the denial of their immunity defense independent of former President Nixon.¹⁵⁵

Writing for the Court, Justice Lewis F. Powell, Jr. determined that, "[o]ur decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of 'absolute immunity.' For executive officials in general, however, our cases make plain that qualified immunity represents the norm."¹⁵⁶ Butterfield and Harlow argued that they were "entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides."¹⁵⁷ Since the President must delegate a large measure of authority, they argued that "recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself."¹⁵⁸ The Court coun-

150. *Id.* at 784–85 (citation omitted).

151. 457 U.S. 800 (1982).

152. *Id.* at 802.

153. *Id.* The alleged conspiracy is the same as involved in *Fitzgerald*. *Id.*

154. *Id.* at 802.

155. *Harlow*, 457 U.S. at 806.

156. *Id.* at 807 (citations omitted).

157. *Id.* at 808.

158. *Id.* at 810.

tered by stating that “we implicitly rejected such derivative immunity in *Butz* In general our cases have followed a ‘functional’ approach to immunity law.”¹⁵⁹

Butterfield and Harlow also asserted their entitlement to immunity based on the “special functions” of White House aides.¹⁶⁰ To this argument the Court responded:

For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. But a ‘special functions’ rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.¹⁶¹

The Court agreed that if Butterfield and Harlow failed to establish absolute immunity, public policy “mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial.”¹⁶² “Yet . . . the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the ‘good faith’ standard established by our decisions.”¹⁶³

The Court reasoned that “Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official’s subjective good faith has been considered to be a question of fact . . . regarded as inherently requiring resolution by a jury.”¹⁶⁴ Justice Powell explained:

Immunity generally is available only to officials performing discretionary functions [and] the judgments surrounding discretionary action almost inevitably are influenced by the decision-

159. *Id.*

160. Harlow, 457 U.S. at 811.

161. *Id.* at 812–13.

162. *Id.* at 813.

163. *Id.* at 814–15.

164. *Id.* at 816.

maker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquires of this kind can be peculiarly disruptive of effective government.¹⁶⁵

Accordingly, the Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁶⁶ The Court reasoned that, "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."¹⁶⁷

The Court fashioned a two-step analysis for issues of qualified immunity on summary judgment.¹⁶⁸ First, the judge should determine what is the currently applicable law.¹⁶⁹ Second, the judge should determine "whether that law was clearly established at the time an action occurred."¹⁷⁰ The Court justified this analysis by stating the following:

If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.¹⁷¹

III. THE HISTORY OF EXECUTIVE PRIVILEGES

Scholarly literature has associated and combined the term "immunity" with "privilege," hence an essential prerequisite to any intelligent discussion

165. *Harlow*, 457 U.S. at 816-17.

166. *Id.* at 818.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Harlow*, 457 U.S. at 818.

171. *Id.*

of privilege involves distinguishing privilege from the related doctrines of governmental immunity.¹⁷² Primarily, executive privilege is defined as an executive official's or a President's claim of constitutional authority to withhold information from the legislative and judicial branches, whereas immunity, if granted, permanently prohibits a plaintiff's cause of action.¹⁷³ "The very words 'executive privilege' were conjoined only yesterday, in 1958."¹⁷⁴ Just as executive immunity began with arguments that the President was not subject to service of process or jurisdiction, these arguments were also advanced by Presidents to avoid subpoenas in executive privilege cases.¹⁷⁵

In addition to a communications privilege, some commentators suggest that the President has a witness privilege.¹⁷⁶ It is suggested that due to presidential responsibilities, a President should be excused from actual appearance, and instead, may give his or her testimony by deposition.¹⁷⁷ However, several Presidents and former Presidents have testified in court and before Congress.¹⁷⁸

172. 26 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE* § 5663 (1992).

173. RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 1 (1974).

174. *Id.* at 1.

175. See NOWAK & ROTUNDA, *supra* note 35, at 235 n.1.

Subpoenas of the President. Prior to the subpoena of a President upheld in *United States v. Nixon*, the courts only twice before issued a subpoena to a sitting President. The first was the subpoena issued to President Jefferson in *United States v. Burr*; Chief Justice Marshall, sitting on circuit during the treason trial of Aaron Burr, was the trial judge. Burr intended to obtain a letter sent to Jefferson as well as various documents. The extent to which Jefferson complied is unclear. Jefferson withheld parts of the letter, and Marshall apparently accepted this withholding. The letter was not introduced in evidence.

On January 3, 1818, President Monroe became the second President to be served with a subpoena while in office.

Id. (citations omitted).

176. WRIGHT & GRAHAM, *supra* note 172, § 5673, at 58.

177. *Id.*

178. See NOWAK & ROTUNDA, *supra* note 35, at 238–39 n.28.

Ford. In *United States v. Fromme*, President Ford was compelled to testify by videotaped deposition at trial of Lynette "Squeaky" Fromme, who had attempted to assassinate Ford. In addition, while President, President Ford voluntarily appeared before a House subcommittee to answer questions that had been raised concerning his pardon of former President Nixon; and on September 15, 1988 Ford voluntarily appeared before a Senate Committee and testified about the War Powers Resolution, which he criticized as "impracticable" and "unconstitutional."

The President has the right to receive confidential communications from his aides and advisors pursuant to Article II of the United States Constitution.¹⁷⁹ “[A]lthough the Constitution does not explicitly reference a privilege of confidentiality, to the extent the President’s interest in confidentiality relates to the effective discharge of Executive powers, it is constitutionally based.”¹⁸⁰ Although the need to protect confidential communications is derived from the constitutional doctrine of separation of powers, executive privilege is not absolute, but rather a qualified privilege.¹⁸¹

Although some commentators thought that executive privilege was first recognized by the courts in the trial of Aaron Burr,¹⁸² most writers assert that the privilege demanded by President Thomas Jefferson during that case was what is today called “executive privilege.”¹⁸³ The case most frequently cited as being the first American decision allowing for the privilege of state secrets is *Totten v. United States*.¹⁸⁴ “However, a careful reading of *Totten* tends to support those who argue that the basis of the decision was the law of contracts, not the privilege for secrets of state.”¹⁸⁵

“In 1953, in the midst of the worst of the McCarthy hysteria, the Supreme Court decided *United States v. Reynolds*, its first and still the leading case on the state secrets privilege.”¹⁸⁶ In *United States v. Rey-*

Carter. During his presidency, President Carter gave videotaped testimony that was presented at the criminal trial of two Georgia state officials charged with gambling conspiracy; two years later, President Carter provided videotaped testimony for a grand jury probing charges that Robert Vesco, a fugitive financier, had enlisted the White House to quash extradition proceedings against him. Also while President, President Carter was interviewed under oath by the Counsel on Professional Responsibility pursuant to a Department of Justice order to investigate “for criminal, civil and administration purposes” any offenses resulting from his brother Billy Carter’s relations with the Libyan Government.

Reagan. In *United States v. Poindexter*, the district court ordered videotaped deposition of former President Reagan, at the insistence of criminal defendant Poindexter; the former President testified on videotape, which was introduced in the trial, which was part of the series of trials prosecuted by the statutorily created Independent Counsel and growing out of the Iran-Contra affair.

Id. (citations omitted).

179. Andrea L. Wolff, *The Federal Advisory Committee Act and the Executive Privilege: Resolving the Separation of Powers Issue*, 5 SETON HALL CONST. L.J. 1023, 1040 (1995).

180. *Id.*

181. *Id.*

182. *United States v. Burr*, 25 F. Cas. 30 (No. 14,692D) (C.C.Va. 1807).

183. WRIGHT & GRAHAM, *supra* note 172, § 5663, at 505–06.

184. 92 U.S. 105 (1875).

185. WRIGHT & GRAHAM, *supra* note 172, § 5663, at 506.

186. *Id.* at 507–08.

nolds,¹⁸⁷ the Supreme Court granted certiorari “[b]ecause an important question of the Government’s privilege to resist discovery is involved”¹⁸⁸ A military aircraft took flight to test secret electronic equipment.¹⁸⁹ While in flight, fire consumed the bomber’s engines and killed six crew members and three civilians in the resulting crash.¹⁹⁰ The widows of the three deceased civilians brought a consolidated suit against the United States.¹⁹¹ During discovery, the widows sought production of the Air Force’s official accident investigation report. The Government moved to quash the request for production on the ground that these matters were privileged against disclosure.¹⁹² After the Government produced the documents to the judge for a determination of whether they contained privileged information, the district court declined the claim of privilege and ordered the documents be produced.¹⁹³ In the end, final judgment was awarded to the widows and an appeal followed.¹⁹⁴ The appellate court affirmed, stating both that there was a sufficient showing of good cause for the production of the documents and as to the ultimate disposition of the case.¹⁹⁵

The government’s attorney argued to the United States Supreme Court that executive department heads have the power to withhold any documents in their custody from judicial view if they deem it to be in the public interest.¹⁹⁶ Writing for the Court, Chief Justice Fred M. Vinson reasoned that, “[w]hen the Secretary of the Air Force lodged his formal ‘Claim of Privilege,’ he attempted therein to invoke the privilege against revealing military secrets. . . .”¹⁹⁷ Ruling on the merits, the Court stated:

[T]he trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed . . . there was certainly a suffi-

187. 345 U.S. 1 (1953).

188. *Id.* at 3.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Reynolds*, 345 U.S. at 3.

193. *Id.* at 5.

194. *Id.*

195. *Id.*

196. *Id.* at 6.

197. *Reynolds*, 345 U.S. at 6.

cient showing of privilege to cut off further demand for the document.¹⁹⁸

Since there was nothing to suggest that the electronic equipment had any causal connection with the accident, the Court reversed the decision of the court of appeals and remanded the case to the district court.¹⁹⁹ Thus, the Court granted a qualified executive privilege to executive department heads in civil suits.

In *United States v. Nixon*,²⁰⁰ an indictment was issued alleging violations of federal statutes by certain White House staff and political supporters of the President. Before trial, the Special Prosecutor filed a motion for a subpoena duces tecum directing President Nixon to produce certain tapes and documents relating to precisely identified conversations and meetings between the President and others.²⁰¹ The President filed a motion to quash the subpoena, claiming executive privilege.²⁰² Initially, President's counsel argued that the court lacked jurisdiction to issue the subpoena, because the matter was an intra-branch dispute between a subordinate and superior officer of the executive branch and hence not subject to judicial review.²⁰³

Writing for a unanimous court, Chief Justice Warren E. Burger first addressed the issue of justiciability. The Court reasoned:

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense . . . [i]n the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence . . . sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable" Moreover, since the matter is one arising in the regular

198. *Id.* at 10–11.

199. *Id.* at 11–12.

200. 418 U.S. 683 (1974).

201. *Id.*

202. *Id.*

203. *Id.* at 692.

course of a federal criminal prosecution, it is within the traditional scope of Art. III power.²⁰⁴

Thus, the Court ruled that the Special Prosecutor has standing to enforce a subpoena duces tecum for the production, before trial, of certain tapes and documents relating to precisely identified conversations and meetings between the President and others.

After determining that the requirements of rule 17(c) were satisfied,²⁰⁵ the Court turned to the claim of executive privilege.²⁰⁶ The President's first argument was that the separation of powers doctrine precluded judicial review of the President's claim of privilege.²⁰⁷ Additionally, the President argued that if he does not prevail on the claim of absolute privilege, the Court should, as a matter of constitutional law, hold that the privilege prevails over the subpoena duces tecum.²⁰⁸ The Court first reiterated a proposition in *Marbury v. Madison*, that "it is emphatically the province and duty of the judicial department to say what the law is."²⁰⁹ Accordingly, the Court concluded that it had the authority in this case to state what the law was regarding the President's claim of privilege.²¹⁰ Turning to the second argument, Chief Justice Burger reasoned:

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III.²¹¹

204. *Id.* at 696-97 (citation omitted).

205. *See United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). In order to require production prior to trial, the moving party must show: 1) that the documents are evidentiary and relevant; 2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; 3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and 4) that the application is made in good faith and is not intended as a general 'fishing expedition.' *Id.* at 338.

206. *Nixon*, 418 U.S. at 703.

207. *Id.*

208. *Id.*

209. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

210. *Id.* at 705.

211. *Nixon*, 418 U.S. at 707.

The Court held that a general claim for the privilege of confidentiality of presidential communications must be weighed against the effects which this particular exercise of privilege would bear against the effective functioning of the judicial process.²¹² However, the Court proceeded to justify the invocation of a qualified, presumptive privilege.

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer. . . ." To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. . . . Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.²¹³

After weighing the competing interests at stake, the Court concluded that President Nixon's generalized interest in confidentiality of communications does not prevail over fundamental demands of due process of law in the fair administration of criminal justice.²¹⁴

In *Nixon v. Administrator of General Services*,²¹⁵ President Nixon, after his resignation, entered into an agreement with the Administrator of General Services that provided for the storage of an estimated 42 million pages of documents and 880 tape recordings. Under the agreement, neither President Nixon nor the General Services Administration ("GSA") could gain access to the materials without the other's consent.²¹⁶ Just after a public announcement of this agreement, a bill was introduced in Congress designed to

212. *Id.* at 707–08.

213. *Id.* at 708–11 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

214. *Id.* at 711–13.

215. 433 U.S. 425 (1977) [hereinafter *General Services*].

216. *Id.*

invalidate it.²¹⁷ Approximately three months later, this bill was enacted as the Presidential Recordings and Materials Preservation Act ("Act") and was signed into law by President Gerald Ford.²¹⁸ The Act directs the Administrator of GSA to take custody of President Nixon's materials and have them screened by Government archivists.²¹⁹ The purpose was to return to President Nixon those materials, personal and private in nature, and to preserve those having historical value.²²⁰ This Act would make important materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke."²²¹

The day after the Act was signed into law, President Nixon filed an action seeking declaratory and injunctive relief against enforcement of the Act by challenging the Act's constitutionality on the grounds that it violates: 1) the principle of separation of powers; 2) the Presidential privilege; 3) President Nixon's privacy interests; 4) his First Amendment associational rights; and 5) the Bill of Attainder Clause.²²² Because this section is only concerned with presidential privileges, this discussion is limited to those issues related to the presidential privilege doctrine.

Writing for the Court, Justice William J. Brennan, Jr. stated that President Nixon may only assert a privilege as to those materials which fall within the scope of the privilege as recognized in *United States v. Nixon*.²²³ The Court stated that *Nixon* held that the privilege is limited to communications "'in performance of [a President's] responsibilities, of his office,'" and made "'in the process of shaping policies and making decisions.'"²²⁴ The Court denied President Nixon's claim of privilege, reasoning that section 104 of the Act directed the Administrator to take into account "'the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege'" and the need to return purely private materials to the President.²²⁵ The Court concluded that, "[i]n view of these specific directions, there is no reason to believe that the restriction on public access ultimately

217. *Id.*

218. *Id.*

219. *Id.*

220. *General Services*, 433 U.S. at 425.

221. *Id.*

222. *Id.* at 425-26.

223. *Id.* at 449.

224. *Id.* (citations omitted).

225. *General Services*, 433 U.S. at 450 (citation omitted).

established by regulation will not be adequate to preserve executive confidentiality.”²²⁶ Ultimately, the Court reasoned:

[that] given the safeguards built into the Act to prevent disclosure of such materials and the minimal nature of the intrusion into the confidentiality of the Presidency, we believe that the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes.²²⁷

Although Supreme Court opinions involving executive privilege cases are sparse, the procedure involved in claiming and establishing the privilege parallels those arguments advanced in *Jones v. Clinton*²²⁸ in support of a “temporary immunity.” This presumptive privilege would entail halting all civil legal process against a sitting President for the duration of his or her tenure. A President may still be sued, but a presumption could be attached where the plaintiff or President will have the burden to show why they would be injured if the proceeding were continued or stayed.

IV. JONES V. CLINTON

A. Facts

On May 6, 1994, Paula Corbin Jones filed suit against President William Jefferson Clinton and Arkansas State Trooper Danny Ferguson, who was assigned to President Clinton’s security detail during his tenure as Arkansas’ Governor.²²⁹ On May 8, 1991, the underlying incident was alleged to have occurred in a Little Rock, Arkansas, hotel suite where President Clinton, then Governor of Arkansas, delivered a speech at a conference that day.²³⁰ According to the complaint, Trooper Danny Ferguson, President Clinton’s bodyguard, delivered a piece of paper to Paula Jones with a four digit number written down and said, “[t]he Governor

226. *Id.*

227. *Id.* at 454.

228. *See* 72 F.3d 1354 (8th Cir. 1996) The dissent argues that the plaintiff should have the burden of proving why this litigation will not interfere with the President’s duties, whereas the concurrence argues that the President should bear the burden of establishing why this litigation would interfere with real and established responsibilities. *Id.* (Ross J., dissenting).

229. *Id.* at 1357.

230. *Id.*

would like to meet with you" in this suite number.²³¹ Jones, a rank-and-file Arkansas state employee being paid approximately \$6.35 per hour, thought it was an honor to be asked to meet with the Governor.²³² It was during this encounter which Paula Jones alleges that President Clinton violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her.²³³ She further alleges that Trooper Ferguson and Mr. Clinton conspired to violate her constitutional rights.²³⁴ The Jones complaint also asserts two supplemental state law claims, one against President Clinton for intentional infliction of emotional distress and the other against both Trooper Ferguson and President Clinton for defamation.²³⁵ On June 10, 1994, Mr. Ferguson answered the complaint, admitting that he traveled in an elevator with Paula Jones and pointed out a particular room of the hotel, but that he had no knowledge of what took place in that room.²³⁶

B. *Prior History of Jones v. Clinton*

In the United States District Court for the Eastern District of Arkansas, Western Division, President Clinton asserted a claim of immunity from civil suit and filed a motion to dismiss the complaint without prejudice to its refiling when he is no longer President.²³⁷ In the alternative, he requested a stay of the proceedings for as long as he remains President.²³⁸ On December 28, 1994, United States District Court Judge Susan Webber Wright denied the sitting President of the United States absolute immunity during presidential service from civil suit for his unofficial acts.²³⁹ Nevertheless, Judge Wright did reason that the separation of powers doctrine entitled President Clinton a "temporary or limited immunity from trial," thereby granting President Clinton a stay of trial during his tenure as President.²⁴⁰ Judge Wright also justified the stay on the basis of her authority under Rule 40 of

231. Complaint at 3, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994) [hereinafter *Jones I*].

232. *Id.*

233. *Jones II*, 72 F.3d at 1357.

234. *Id.*

235. *Id.*

236. Answer of Danny Ferguson at 3-4, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994).

237. *Jones I*, 869 F. Supp. at 692.

238. *Id.*

239. *Id.* at 698.

240. *Id.* at 699.

the *Federal Rules of Civil Procedure*²⁴¹ and “the equity powers of the Court.”²⁴² The court concluded that the claims against Trooper Ferguson were so factually and legally intertwined with the claims of President Clinton that the stay from trial also applied to Mr. Ferguson. However, the court allowed discovery to go forward on Mrs. Jones’ claims against both defendants.²⁴³

President Clinton appealed the district court’s decision to the United States Court of Appeals for the Eighth Circuit, arguing that the court should have dismissed the suit without prejudice to the refile of Mrs. Jones’ suit when he is no longer President.²⁴⁴ President Clinton also challenged the decision to permit discovery to proceed during the stay of trial.²⁴⁵ Contemporaneously, Paula Jones cross-appealed, arguing that the stay entered by the district court was in error, and the case should be allowed to proceed through trial.²⁴⁶

Writing for a divided panel, circuit Judge Bowman began with the proposition that the President, like all other government officials, is subject to the same laws that apply to all other members of American society.²⁴⁷ The appellate court rationally grounded its holding by stating that “[b]y definition, unofficial acts are not within the perimeter of the President’s official responsibility at all, even the outer perimeter.”²⁴⁸ Therefore, President Clinton’s claim of immunity was not within the holding of *Nixon v. Fitzgerald*.²⁴⁹ The appellate court continued, “[w]e thus are unable to read *Fitzgerald* as support for the proposition that the separation of powers doctrine provides immunity for the individual who serves as President from lawsuits seeking to hold him accountable for his unofficial actions.”²⁵⁰

Turning to the issue of temporary immunity, the appellate court cited *Marbury v. Madison*²⁵¹ for the proposition that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protec-

241. See FED. R. CIV. P. 40 (allowing district courts to place actions upon its trial calendar).

242. *Jones I*, 869 F. Supp. at 699.

243. *Id.*

244. *Jones II*, 72 F.3d at 1356.

245. *Id.*

246. *Id.*

247. *Id.* at 1358.

248. *Id.* at 1359.

249. *Jones II*, 72 F.3d at 1359.

250. *Id.*

251. 5 U.S. (1 Cranch) 137, 163 (1803).

tion of the laws, whenever he receives an injury,” and the court stated that “Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws.”²⁵² Judge Bowman reasoned:

Mrs. Jones’s [sic] claims, except for her defamation claim, concern actions by Mr. Clinton that, beyond cavil, are unrelated to his duties as President. This lawsuit thus does not implicate presidential decision-making. If this suit goes forward, the President still will be able to carry out his duties without any concern that he might be sued for damages by a constituent aggrieved by some official presidential act. Though amenable to suit for his private acts, the President retains the absolute immunity found in *Fitzgerald* for official acts, and presidential decision-making will not be impaired.²⁵³

Thus, the court of appeals held that the Constitution does not provide a sitting President with any immunity from civil actions based on unofficial, pre-presidential actions.²⁵⁴ The case was remanded to the district court to lift the stays and to allow Mrs. Jones’ suit to proceed against President Clinton and Trooper Ferguson.²⁵⁵

In a special concurrence, circuit Judge Beam wrote separately to express his conviction on three points “insufficiently discussed” by the dissent and Judge Bowman.²⁵⁶ First, Judge Beam discussed how the stay of proceedings would affect Paula Jones’ claim by justifiably realizing,

Ms. Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time If a blanket stay is granted and discovery is precluded as suggested by Mr. Clinton and his amicus, Ms. Jones will have no way . . . to perpetuate the testimony of any party or witness should they die or become incompetent during the period the matter is held in abeyance Thus, her “chase in action” would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal.²⁵⁷

252. *Jones II*, 72 F.3d at 1360 (citation omitted).

253. *Id.* (footnote omitted).

254. *Id.* at 1363.

255. *Id.*

256. *Id.* (Beam J., concurring specially).

257. *Jones II*, 72 F.3d at 1363–64.

Judge Beam continued his analysis by addressing the dissent's contention that the burden of proof establishing "irreparable injury" along with a showing "that the immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office" should lie with Ms. Jones.²⁵⁸ Judge Beam reasoned that "a litigant could [n]ever successfully shoulder the burden assigned by the dissent, especially if all discovery is prohibited."²⁵⁹ Rather, the burden should be upon "the party seeking to delay the usual course of discovery and trial" as in any other civil litigation.²⁶⁰

Next, Judge Beam discussed the impact this litigation could have on the President. After citing to numerous instances where an incumbent President has been subject to judicial actions, Judge Beam reasoned that since these previous Presidents had managed to schedule "these encounters without creating a cataclysmic episode in which the constitutional duties of the office have been compromised," accordingly, President Clinton could similarly manage his duties of office while following discovery requests based on an uncomplicated civil litigation.²⁶¹ Moreover, the trial judge's careful supervision of the litigation can make certain that discovery requests are "carried out with a minimum of impact on the President's schedule."²⁶²

Judge Beam then turned his concern to Trooper Danny Ferguson. Judge Beam discussed how he could find "no separation of powers or other constitutional basis for a stay" for the claims against Trooper Ferguson.²⁶³ Judge Beam concluded that:

Judge Bowman's opinion reasonably charts a fair course through the competing constitutional waters and does so without serious injury to the rights of any party. As I have attempted to stress, nothing prohibits the trial judge from halting or delaying or re-scheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled.²⁶⁴

Despite these rational and legally based opinions, circuit Judge Ross dissented from the majority opinion. Judge Ross would have held that,

258. *Id.* at 1364 (citation omitted).

259. *Id.*

260. *Id.*

261. *Id.* at 1366.

262. *Jones II*, 72 F.3d at 1366.

263. *Id.* at 1367.

264. *Id.*

“unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President’s term.”²⁶⁵ After reiterating the holding and public policy arguments advanced in *Nixon v. Fitzgerald*,²⁶⁶ Judge Ross argued, “[w]hile the majority would encourage other courts to exercise ‘judicial case management sensitive to the burdens of the presidency,’ . . . only a stay of civil litigation during a President’s term in office will ensure the performance of Executive duties unencumbered by the judiciary and thereby avoid separation of powers conflicts.”²⁶⁷ Judge Ross reasoned:

Where there is no urgency to pursue a suit for civil damages, the proper course is to avoid opportunities for breaching separation of powers altogether by holding the litigation in abeyance until a President leaves office. The cause of action should be stayed unless the plaintiff can show that he or she will suffer irreparable injury without immediate relief and that the immediate adjudication of the suit will not significantly impair the President’s ability to attend to the duties of his office.

It is important to keep in mind that the issue here is not *whether* the President may be required to answer claims based on unofficial conduct, but *when*. This conclusion merely delays, rather than defeats, the vindication of the plaintiff’s private legal interests, and thus is far less burdensome for a plaintiff than the absolute immunity recognized in *Fitzgerald*. A stay for the duration of the President’s service in office would not prevent Jones from ultimately obtaining an adjudication of her claims. Rather, staying the litigation will protect the important public and constitutional interests in the President’s unimpaired performance of his duties, while preserving a plaintiff’s ability to obtain resolution of his or her claims on the merits.²⁶⁸

Additionally, Judge Ross reasoned that a stay of the proceedings against Trooper Ferguson is “essential if the President is to be fully protected.”²⁶⁹ Judge Ross insisted:

265. *Id.* at 1367 (Ross J., dissenting).

266. 457 U.S. 731 (1982).

267. *Jones II*, 72 F.3d at 1369 (quoting Bowman J., majority opinion).

268. *Id.*

269. *Id.* at 1370.

[that he] would hold that to rebut the presumption that private suits against a sitting President should not go forward during the President's service in office, the plaintiff should have to demonstrate convincingly both that delay will seriously prejudice the plaintiff's interests and that immediate adjudication of the suit will not significantly impair the President's ability to attend to the duties of his office. Absent such a showing, the litigation should be deferred.²⁷⁰

In Judge Ross's opinion, "the stay should include pretrial discovery, as well as the trial proceedings, because discovery is likely to pose even more intrusive and burdensome demands on the President's time and attention than the eventual trial itself."²⁷¹

C. *Current Status of Jones v. Clinton*

On May 15, 1996, President Clinton petitioned the United States Supreme Court for a writ of certiorari.²⁷² The first of two questions presented was whether the incumbent President is entitled to immunity, for the duration of his Presidency, from a civil suit for damages for his unofficial actions. The second question is whether the district court properly exercised its discretion by granting a stay of trial until the President leaves office.

President Clinton's counsel, Robert S. Bennett, stated four reasons for granting the petition. Counsel claimed that the decision of the United States Court of Appeals is inconsistent with previous Supreme Court decisions and jeopardizes the separation of powers doctrine.²⁷³ Counsel contended that "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint."²⁷⁴ Counsel presumed that the court of appeals "concluded that because the *Fitzgerald* holding was limited to civil damages claims challenging official acts, the President should receive no form of protection from any other civil suits," which is completely "inconsistent with the reasoning of *Fitzgerald*."²⁷⁵ Counsel persisted:

270. *Id.*

271. *Id.* at 1369-70.

272. Petition for Writ of Certiorari at 21, *Clinton v. Jones*, 72 F.3d 1354 (8th Cir. 1996), *cert. granted*, 116 S. Ct. 2545 (1996) (No. 95-1050) [hereinafter *Petition*].

273. *Id.* at 9.

274. *Id.* (citing *Nixon*, 457 U.S. at 749).

275. *Id.*

[t]he Court in *Fitzgerald* determined that the President was entitled to absolute immunity not only because the threat of liability for official acts might inhibit him in the exercise of his authority, but also because, in the Court's words, 'the singular importance of the President's duties' means that 'diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.'²⁷⁶

Thus, the President's counsel places unwieldy emphasis upon this second policy argument, and concluded that the Court of Appeals "ignored this second basis for the holding of *Fitzgerald*."²⁷⁷

Next, Mr. Bennett argued that the Court of Appeals erred by viewing the relief sought by the President as extraordinary.²⁷⁸ As support for this proposition, counsel maintained that, "[t]here are numerous instances where civil plaintiffs are required to accept the temporary postponement of litigation so that important institutional or public interests can be protected."²⁷⁹ Three examples are advanced in support of this proposition. First, the Soldiers' and Sailors' Civil Relief Act of 1940²⁸⁰ grants military personnel the right to toll or stay civil claims while they are on active duty. Therefore, "President Clinton here thus seeks relief similar to that to which he may be entitled as Commander-In-Chief of the Armed Forces."²⁸¹ Next,

[t]he so-called automatic stay provision of the Bankruptcy Code similarly provides that litigation against a debtor is to be stayed as soon as a party files a bankruptcy petition. Thus, if [Paula Jones] had sued a party who entered bankruptcy, [she] would automatically find herself in the same position she will be in if the President prevails before this Court--except that the bankruptcy stay is indefinite, while the stay in this case has a definite term, circumscribed by the constitutional limit on a President's tenure in office.²⁸²

276. *Id.* (citing *Nixon* 457 U.S. at 751-52).

277. Petition at 10, *Clinton* (No. 95-1050).

278. *Id.* at 14.

279. *Id.*

280. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 521 (1988 & Supp. V 1993).

281. Petition at 14-15, *Clinton* (No. 95-1050).

282. *Id.* at 15.

Lastly, courts may “put off civil litigation until the conclusion of a related criminal prosecution against the same defendant.”²⁸³ As a result, counsel argued that “these examples thoroughly dispel any suggestion that the President, in asking that this litigation be deferred, is somehow placing himself ‘above the law,’ or that holding this litigation in abeyance would impermissibly violate a plaintiff’s entitlement to access to the courts.”²⁸⁴

Next, it is argued that the court of appeals erred in asserting jurisdiction over, and reversing, the district court’s discretionary decision to stay the trial until after the President leaves office.²⁸⁵ Mr. Bennett reasoned:

The question of whether the President is entitled, as a matter of law, to defer this litigation is analytically distinct from the question of whether a district court may exercise its discretion to stay all or part of the litigation . . . the latter is a discretionary determination to be made on the basis of the particular facts of the case. Moreover, . . . a court’s exercise of discretion to stay proceedings is a determination that can be overturned only for abuse of that discretion. The panel majority’s expansion of the court of appeals’ jurisdiction over [Paula Jones’] interlocutory appeal was in error.²⁸⁶

Counsel concluded that the appellate court never conducted “the kind of careful weighing of the particular facts and circumstances that might warrant a conclusion that the trial court here abused its discretion.”²⁸⁷

Finally, the President’s attorney made an argument that the Supreme Court should grant review now in order to protect the interests of the Presidency.²⁸⁸ Counsel reasoned, “Now, a court for the first time in history has held that a sitting President is required to defend a private civil damages action.”²⁸⁹ Ending his arguments, counsel reasoned:

There is no question that the issues raised by this case will have profound consequences for both the Presidency and the Judiciary. The last word on issues of this importance should not be a decision by a splintered panel of a court of appeals—a decision that is incon-

283. *Id.*

284. *Id.* at 16.

285. *Id.*

286. Petition at 17–19, *Clinton* (No. 95-1050).

287. *Id.* at 19.

288. *Id.* at 20.

289. *Id.*

sistent with the precedents of this Court and with the constitutional tradition of separation of powers.²⁹⁰

Therefore, counsel pleaded for the Supreme Court to grant the President's petition for writ of certiorari.

On May 17 of 1996, Attorney Gilbert K. Davis, Paula Corbin Jones' counsel, responded in opposition to President Clinton's petition for writ of certiorari.²⁹¹ Mr. Davis reinforced three reasons why the Supreme Court should deny the petition. His first declaration bolsters the argument that this case in no way possesses any consequential threat to the functioning of the executive branch. Mr. Davis reiterates that this case is "a very simple dispute about what happened in a very short encounter between two people," and quite possibly the least burdensome case a President may ever face.²⁹² Gilbert Davis argues that President Clinton has "sought to advance his argument that this litigation might 'interfere with [his] constitutionally assigned duties . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit.'"²⁹³ As counsel made clear:

In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." The historical record reveals no claims of any presidential hardship in these cases, let alone any claims of presidential immunities.²⁹⁴

Concluding that President Clinton failed to raise any concrete issue as to any institutional interference with the Presidency, Mr. Davis reasoned that the President shows neither the extent to which this litigation would violate the separation of powers nor how the executive branch would be prevented from accomplishing its constitutionally assigned functions.²⁹⁵

Mr. Gilbert's second argument attacks the President's contention that this litigation comes within the immunity doctrine espoused in *Nixon v.*

290. *Id.* at 21.

291. Brief for Respondent at 24, *Clinton v. Jones*, 72 F. 3d 1354 (8th Cir.), *cert. granted*, 116 S. Ct. 2545 (1996) (No. 95-1050).

292. *Id.* at 10.

293. *Id.*

294. *Id.* at 11 (citation omitted).

295. *Id.* at 14.

Fitzgerald.²⁹⁶ Counsel argued that the President is not entitled, as a matter of law, to defer this litigation, because the acts complained of are not within the outer perimeter of his official duties.²⁹⁷ Mr. Davis stated that "Mr. Clinton consistently styled his claim as one of immunity. He has now dropped that word, but the relief he seeks is effectively the same."²⁹⁸ Following counsel's logic, he stated:

[N]otwithstanding [the President's] advocacy of discretionary stays, he still contends that under *Nixon v. Fitzgerald* he is "entitled, as a matter of law, to defer this litigation" for the remainder of his presidency. That is essentially the argument for presidential immunity . . . [but] [i]n more than a century of immunity decisions, from *Bradley v. Fisher*, to *Fitzgerald*, this Court has not once suggested that a public official could avoid litigation of a case involving only unofficial acts. To the contrary, as Chief Justice Burger's concurrence in *Fitzgerald* repeatedly stressed, the Court's cases have always presumed that protection of public officials from suit covers only official actions and "does not extend beyond such actions"—that "a President, like Members of Congress, judges, prosecutors, or congressional aides . . . [is] not immune for acts outside official duties." It was precisely that limitation that allowed Chief Justice Burger to declare that *Fitzgerald* did not place [the] President "above the law."²⁹⁹

Counsel concluded that nothing within the *Fitzgerald* opinion grants or even suggests that a President, when acting personally, has any immunity, neither qualified nor absolute. Counsel reasoned that to extend immunity here "would contravene the Nation's egalitarian civic creed and the Constitution's guarantee of equal protection of the laws."³⁰⁰ As the appeals court reasoned, Article II of the United States Constitution certainly did not create a monarchy.³⁰¹

Counsel argued that the appeals court, in a proper exercise of jurisdiction, correctly reversed the district court's grant of temporary immunity from trial and its stay of proceedings.³⁰² Counsel reasoned that the appeals court

296. 457 U.S. 731 (1982).

297. Brief for Respondent at 14, *Clinton* (No. 95-1050).

298. *Id.*

299. *Id.* at 15-16 (citations omitted).

300. *Id.* at 18.

301. *Id.*

302. Brief for Respondent at 20, *Clinton* (No. 95-1050).

correctly determined that what the district court ordered, a postponement of trial, was "the functional equivalent of a grant of temporary immunity."³⁰³ Even though the trial court had the power to stay proceedings, "the District Court's decision was a manifest abuse of discretion."³⁰⁴ Mr. Gilbert stressed that when the district court granted trial immunity to President Clinton, the court made no finding that the President even attempted to make a showing of an actual and "clear case of hardship," as required to stay a proceeding.³⁰⁵ The appellate court's ruling was proper, despite the district court's recitation of Rule 40 of the *Federal Rules of Civil Procedure*³⁰⁶ and the court's equity powers, because the district court's order was based upon its erroneous holding that Mr. Clinton was entitled to "immunity from trial as *Fitzgerald* seems to require."³⁰⁷

Despite Mr. Gilbert's arguments espousing the correct scope of the cases mentioned herein, on June 24 of 1996, the Supreme Court of the United States granted President Clinton's petition for writ of certiorari.³⁰⁸

V. PRESIDENTIAL PRIVILEGE

If the Supreme Court extends any protection to President Clinton according to the circumstances underlying *Jones*, then, initially, there must be a determination made to precisely label the form of relief sought by the President. President Clinton hopes to persuade the Supreme Court to recognize some form of immunity, applicable only to the office of the President. However, all rational analyses seem to weight heavily in Paula Jones' favor when distinguishing the circumstances involved in *Jones* to the holding and policy arguments advanced in *Nixon*.³⁰⁹ According to *Nixon*, presidential immunity attaches to broad official actions within the scope of a President's responsibility.³¹⁰ The more narrow functional approach to the immunity doctrine extends to grant officials immunity only for acts within the functions provided to that particular official's discretion and responsibilities. Regardless, President Clinton petitions the Supreme Court to provide the office of the President monumental protection from practically

303. *Id.*

304. *Id.*

305. *Id.* at 21.

306. FED. R. CIV. P. 40.

307. Brief for Respondent at 21, *Clinton* (No. 95-1050).

308. 116 S. Ct. 2545 (1996).

309. 457 U.S. 731 (1982).

310. *Id.* at 756.

all phases of a civil litigation, from discovery through trial, until the President leaves office.

Contrary to the holdings of every executive immunity case, President Clinton's claim arises from actions prior to his Presidency and completely outside of any functional or discretionary executive action taken by then Governor Clinton. If any other citizen, executive official, judge, or legislator were to argue immunity from trial, then summary judgment would have surely put an end to such a claim, because President Clinton's actions were outside of any broad zone of an official's duties or responsibilities. Nevertheless, the Chief Executive of the United States is not just one person in one office representing one department, but rather one person representing an entire branch of government. For this reason alone, the office of the President is definitely unique and merits some form of protection from disruptive lawsuits.

However, any claim of immunity by President Clinton is erroneous. Both qualified and absolute immunity, if granted, permanently bars a plaintiff's civil damages action. In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,³¹¹ the Second Circuit's test to determine whether an official's actions were within the established immunity doctrine, required that it must first be determined whether the official was acting "within the outer perimeter of his line of duty."³¹² The holding in *Nixon* established this identical limit upon claims of presidential immunity.³¹³ Clearly, President Clinton's claim of a temporary immunity for pre-presidential, unofficial actions immediately fails under any established immunity doctrine, definition, or test.

In reality, what President Clinton seeks to avoid is the rigorous judicial process only during his tenure as President. President Clinton claims that he and all future Presidents should be entitled to some form of protection for the purpose of being unencumbered while in the execution of Article II responsibilities. This claim has policy merit due to the possibility that the overwhelming exposure of the President makes him "an easily identifiable target for suits for civil damages[,] and consequently, could frequently "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."³¹⁴

311. 456 F.2d 1339 (2d Cir. 1972).

312. *Id.* at 1343 (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959)).

313. *Nixon*, 457 U.S. at 756.

314. *Id.* at 753.

President Clinton's ultimate relief is more akin to the term "*presidential privilege*" rather than "temporary immunity." Logically, Mr. Clinton's relief should be termed a privilege, because supporters argue that this temporary immunity should be presumptive with a burden of proof for either the plaintiff or President to establish.³¹⁵ This presumptiveness parallels the procedure established for claims based on executive privilege.³¹⁶ Moreover, the President's ultimate relief is definitely not any form of an immunity, because, by definition, it is temporary and of a fixed duration.³¹⁷ On the other hand, every single grant of immunity has permanently barred the underlying claim. Therefore, how can the President's requested relief be termed "temporary immunity?" The term "temporary immunity" is an oxymoron and absolutely unsuited for any intelligent constitutional analysis. Additionally, President Clinton's relief is exclusively presidential, because all policy arguments supporting President Clinton's claim focus upon the Article II responsibilities and unique office of the Presidency. Therefore, any temporary relief granted to the office of the Presidency should be entitled *presidential privilege*, because Clinton's position parallels executive privilege cases while his basic argument focuses on the uniqueness of the oval office.

Rationalizing the arguments advanced, both pro and con, for President Clinton's claim of a *presidential privilege*, one must recall that these arguments were advanced in both executive immunity and executive privilege cases. According to Judge Ross' dissent in *Jones*, "unless exigent circumstances can be shown, private actions for damages against a sitting President of the United States, even though based on unofficial acts, must be stayed until the completion of the President's term."³¹⁸ Thus, Judge Ross would allow the President a presumptive privilege, which can only be countered with a showing of exigent circumstances. Judge Ross' test parallels that espoused in the *Reynolds* and *Nixon* cases. In *Reynolds*, the Court championed the procedure involved in assessing an executive privi-

315. See *Jones v. Clinton*, 72 F.3d 1354 (1996) (presenting conflicting opinions as both the concurrence and the dissent argue whether the plaintiff or the president should bear the burden of proof).

316. See *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (concluding that the person alleging the privilege must make a formal claim of privilege, and then, the opposing party must rebut any presumption of privilege).

317. See Petition at 15, *Clinton* (No. 95-1050) (arguing that a stay in this case has a definite term based on the constitutional limit on a president's tenure in office).

318. *Jones II*, 72 F.3d at 1367 (Ross J., dissenting).

lege issue. First, there must be a formal claim of privilege.³¹⁹ Thus, it is entirely proper to initially rule that a plaintiff has shown probable cause for the discovery of privileged information.³²⁰ Thereafter, when the formal claim of privilege is asserted, it must be determined if there is a sufficient showing of privilege to cut off further demand for the privileged information.³²¹ President Clinton is not asserting an absolute immunity from civil process, but a qualified privilege against compelled participation in the process while in office. As a result, a President can be served process and be subjected to judicial process. However, once a President asserts a formal *presidential privilege* claim, then it must be determined if there is a sufficient showing of privilege to cut off further demand for the privileged information.

In *United States v. Nixon*,³²² the Court weighed the competing interests at stake and concluded that a President's generalized interest in confidentiality of communications does not prevail over fundamental demands of due process of law in the fair administration of criminal justice.³²³ Hence, Judge Ross' test parallels the procedures and balancing of interests used by the Supreme Court to evaluate a claim of executive privilege because a President bears the burden of establishing the privilege while the court balances the competing interests. President Clinton does not assert that he is always immune from this type of suit, rather that the office itself holds the privilege. Thus, *presidential privilege* is a President's claim of constitutional authority to withhold information, not from the legislative and judicial branches, but from a civil plaintiff while the President remains in office, provided that the President's interest for the privilege relates to the effective discharge of executive powers.

VI. STAY OF PROCEEDINGS

The trial court in *Jones v. Clinton* granted the President "temporary or limited immunity from trial" on the basis of the court's discretion and equity powers.³²⁴ Yet, the appellate court debated whether the plaintiff or the President should bear the "burden of showing specific hardship or inequity if

319. *Reynolds*, 345 U.S. at 10.

320. *Id.*

321. *Id.* at 10-11.

322. 418 U.S. 683 (1974).

323. *Id.* at 711-13.

324. *Jones I*, 869 F. Supp. at 699.

he or she is required to go forward.”³²⁵ If the Supreme Court grants President Clinton a *presidential privilege* to stay any proceedings of this matter during the President’s tenure in office, then the Supreme Court must address whether the trial court has the power and discretion to grant a stay of trial, and whether the plaintiff or President must shoulder any burden of proof.

A. *The Trial Court*

President Clinton’s counsel cites *Landis v. North American Co.*,³²⁶ in support of the trial court’s discretion to stay the trial. Writing for the Court in *Landis*, Justice Benjamin N. Cardozo reasoned:

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants . . . True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.³²⁷

The *Landis* Court went on to state:

Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted . . . Even so, the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the petitioners, suppliants for relief, and discretion was abused if the stay was not kept within the bounds of moderation.³²⁸

Nonetheless, this case concerned the power of a court to stay proceedings in one suit until the decision of an identical suit in another court is rendered.³²⁹ Therefore, the *Landis* decision is distinguishable here, because Paula Jones has filed only one suit in federal court.

President Clinton argued, in his petition for writ of certiorari, that the trial court’s discretionary “decision to postpone trial — unlike review of its

325. *Jones II*, 72 F.3d at 1364.

326. 299 U.S. 248 (1936).

327. *Id.* at 254–55.

328. *Id.* at 256.

329. *Id.* at 249.

decision to reject the President's position that the entire case should be deferred as a matter of law — must address these particular facts of this case.”³³⁰ Additionally, “[t]he panel majority justified its reversal of the district court with a single sentence in a footnote . . . [and] it is unclear what the panel meant by labeling the district court's order the ‘functional equivalent’ of ‘temporary immunity.’”³³¹ Thus, “in its sweeping and conclusory ruling, [the appellate court] did not begin to conduct the kind of careful weighing of the particular facts and circumstances that might warrant a conclusion that the trial court here abused its discretion.”³³²

Countering this argument, Paula Jones' counsel contested the President's claim by asserting that “Mr. Clinton misconstrues” the *Landis* case.³³³ After reciting the holding in *Landis*, counsel argued that “a stay of litigation may be granted ‘[o]nly in rare circumstances.’”³³⁴ Counsel contended that the appellate court was faithful to the holding in *Landis* when they properly reversed the trial court's postponement of trial.³³⁵ Counsel reasoned:

In granting trial “immunity” to Mr. Clinton, the District Court made no finding that Mr. Clinton had made a showing of an actual and “clear case of hardship,” a showing not even attempted. As Judge Beam explained, moreover, the danger of harm to Ms. Jones was manifest: she “faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time.”³³⁶ And the passage of time contemplated by the District Court's order—possibly into the next century—was surely immoderate. Indeed, in *Landis* itself, the Court found “the limits of a fair discretion” to have been “exceeded” by a stay that had suspended “the proceedings in the District Court . . . more than a year.”³³⁷ And since the “stay,” despite the District Court's citation of FED. R. CIV. P. 40 and the court's equity powers, was dependent upon its erroneous holding that Mr. Clinton was entitled to an “immunity

330. Petition at 18, *Clinton* (No. 95-1050).

331. *Id.* at 19 (quoting *Jones II*, 72 F.3d at 1361).

332. *Id.*

333. Brief for Respondent at 20, *Clinton* (No. 95-1050).

334. *Id.* at 21 (quoting *Landis*, 299 U.S. at 255).

335. *Id.*

336. *Id.* (citing *Jones II*, 72 F.3d at 1364).

337. *Id.* (citing *Landis*, 299 U.S. at 256).

from trial as *Fitzgerald* seems to require," it was properly reversed for that error as well.³³⁸

Accordingly, Paula Jones argued that the decision rendered in the appellate court was correct, and her case should proceed against Mr. Clinton and Trooper Ferguson.

Due to the fact that a trial court has the power to control its docket, the Supreme Court will have to determine whether the district court properly exercised its discretion to stay the trial until President Clinton leaves office. On this same issue, the appellate court stated:

The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.³³⁹

Thus, the court's justification is to allow the trial court to use its discretionary functions to protect the President when there is a clear and actual conflict between Presidential duties and the judicial process, not a wholesale grant of immunity from trial while sitting as President.

B. *Burden of Proof*

Writing his dissent for the appellate court, Judge Ross reasoned that "[t]he burdens and demands of civil litigation can be expected to impinge on the President's discharge of his constitutional office by forcing him to divert his energy and attention from the rigorous demands of his office to the task of protecting himself against personal liability."³⁴⁰ Thus, circuit Judge Ross asserted that "[t]he cause of action should be stayed unless the plaintiff can show that he or she will suffer irreparable injury without immediate relief and that the immediate adjudication of the suit will not significantly impair

338. Brief for Respondent at 21, *Clinton* (No. 95-1050) (citing *Jones I*, 869 F. Supp. at 699).

339. *Jones II*, 72 F.3d at 1362-63.

340. *Id.* at 1367 (Ross, J., dissenting).

the President's ability to attend to the duties of his office."³⁴¹ However, Judge Ross cites no authority nor any public policy arguments to support his proposition for shifting the burden onto the plaintiff.

Subsequently, circuit Judge Beam, writing a special concurrence for the court, specifically stated that:

The dissent cites no established authority or case precedent for this burden-shifting strategy, even by analogy to some reasonably comparable situation. I have discovered none. In this regard, there is no way, in my view, that a litigant could ever successfully shoulder the burden assigned by the dissent, especially if all discovery is prohibited. [T]he burden . . . should be shouldered, as in any other civil litigation, by the party seeking to delay the usual course of discovery and trial. Otherwise, we will have established requirements of insurmountable proportions for any litigant who may have a viable and urgent civil claim against a sitting President or perhaps, against other important governmental figures with constitutionally established duties.

This approach to staying litigation is a well-established legal concept.³⁴²

Judge Beam reiterated that the traditional approach espoused in *Landis* established that the person applying for the stay has the burden of showing any specific hardship or inequity before the court will grant any stay of the proceedings.³⁴³ If the Supreme Court follows the traditional approach, then President Clinton will have the burden of establishing a stay from proceedings.

VII. CONCLUSION

Since the Supreme Court granted President Clinton's petition for certiorari, the Justices must determine whether President Clinton is entitled to a *presidential privilege* against civil process during his tenure for allegedly unofficial, pre-presidential actions. Paula Jones' allegations have lost the attention of Americans, but the issues now involved are quite real and will impact the Presidency for the immediate and foreseeable future. In this

341. *Id.* at 1369.

342. *Id.* at 1364 (Beam, J., concurring specially).

343. *Id.*

regard, one should not take lightly the allegations advanced; rather, one should focus upon the issues raised by Paula Jones and President Clinton.

If the Supreme Court grants President Clinton a *presidential privilege* against compelled civil process, then the King cannot be wrong while occupying the oval office. Consequently, the doctrine of presidential immunity may encounter a ripple-effect, whereby the historic functional approach may be altered in favor of public policy concerns for an unimpeded Presidency. As a result, the last quasi-judicial process available will be the process of impeachment. But due to the conflicting views in the appellate court's decision on who should bear the burden of proof, the Supreme Court may have to address this issue. If *Landis* is controlling, then President Clinton will bear any burden of *proving* that this litigation will harm his ability to function as President.

If the Supreme Court follows *stare decisis* and applies the holding in *Nixon v. Fitzgerald*, then the appellate court's decision may stand. Since President Clinton's alleged actions are pre-presidential, any application of the holding in *Nixon v. Fitzgerald* will result in a denial of the President's claim for relief. Thus, Paula Jones will be able to claim the protection of the laws against a sitting President, whenever injury results. In the end, every person interested should hope that justice will prevail, and Paula Jones will soon get her day in court.

The Supreme Court may extend to the Presidency a new *presidential privilege*, effectively carving out a constitutional exception applicable only to the presidential office. Contemporary pressures upon the Presidency may favor a policy of allowing the President unimpeded civil protection to perform his or her Article II duties. However, the Court is more likely to take Chief Justice Burger's view in *United States v. Nixon*, that this new *presidential privilege* will gravely impair the role of the courts under Article III and upset the constitutional balance of powers.³⁴⁴

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344. 418 U.S. at 707.

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